

THE MODERN LAW REVIEW

Volume 20

September 1957

No. 5

VICARIOUS LIABILITY AND THE MASTER'S INDEMNITY

(continued from p. 235)

THE only philosophy of vicarious liability that will satisfy everybody is one based on "public policy" or "social necessity." But it will not do merely to invoke these phrases—as Holdsworth did the first, and as Lord Simonds did the second¹—without some explanation of how vicarious responsibility promotes or serves them. There are in fact two possible explanations, one related to the notion of fault and one to the economic distribution of risk.

VICARIOUS LIABILITY AS RELATED TO THE MASTER'S FAULT

The first line of argument is to say that vicarious liability is justified, on grounds either of moral reparation or of deterrence, because of a presumption of the master's fault. When a servant commits a tort in the course of his employment, the master is very often guilty of what German lawyers call *culpa in eligendo* or *culpa in inspiciendo*. The "control" theory of liability in effect amounts to the same assertion. Control may be of some legal value in establishing the technical relation of master and servant, but it is not (as it is sometimes treated²) in itself a philosophical basis of vicarious liability—except through the manufacture of yet another principle of natural justice. The control theory makes sense only by linking it to the presumption of fault. Even so, it works imperfectly. The person with real control over the crew of a ship is the captain or master,

¹ Holdsworth, viii, 477; *Mersey Docks and Harbour Board v. Coggins & Griffiths, Ltd.* [1947] A.C. at 18. Holdsworth referred to dicta of Holt C.J., but these were little more than the rule itself dressed up.

² Thus Denning L.J. said: "The reason why the employers are liable is not because they can control the way in which the work is done—they often have not sufficient knowledge to do so—but because they employ the staff and have chosen them for the task, and have in their hands the ultimate sanction for good conduct, the power of dismissal" (*Cassidy v. Ministry of Health* [1951] 2 K.B. at 360 (C.A.)).

yet he is not liable for the torts of the crew³; the owners, who are liable, are far away and may have no competence in maritime matters.

If the employer is at fault, why is not the plaintiff left to an ordinary action against him for personal negligence? The answer generally given is that it is difficult to prove negligence, particularly where the proof requires the evidence of employees of the master. The impulse of loyalty, not to say self-interest, is strong, and can completely distort the truth. Another reason, which has already been referred to, is that the plaintiff may not even know which servant committed the tort, though it may be clear that one of the defendant's servants must have done so, and must have been negligent, and there may be an unprovable possibility that the master also was negligent. If the master were not liable, in the absence of positive evidence of personal fault, not only would there be no incentive for him to take the initiative in discovering which of his servants was at fault, but there would be no incentive for him to take steps to prevent it recurring.

The objection to the fault theory of vicarious liability is a familiar one. It is that the master is not allowed to shield himself by proving that he exercised care. Those judges who base the liability upon fault find themselves obliged to add, in effect, that the base is smaller than the superstructure.⁴ There are circumstances when the master can prove beyond doubt that he exercised all possible care. He may, for example, have given his drivers a reasonable time schedule, forbidden them to race, and enforced his order by dismissal of offenders; yet he will still be liable for an injury occasioned if a driver races in disobedience to orders. There is no way of reconciling this with a theory of presumption of fault, unless the presumption is the irrebuttable kind that merely creates a legal fiction. In Germany and Switzerland they manage to get on without vicarious liability, being merely especially careful to see that the master does not exculpate himself unless he proves that his whole system was a careful one.⁵ That is a true system of liability for fault, the plaintiff's difficulties being assisted by shifting the burden of proof and by a certain reluctance to find for the master. In

³ At one time in the old Court of Admiralty the master of the vessel was liable for the torts of the crew: Holdsworth, viii, 250.

⁴ "The master is chargeable, for the master at his peril ought to take care what servant he employs; and it is more reasonable that he should suffer for the cheats of his servant than strangers": *per* Holt C.J. in *Wayland's Case* (1707) 3 Salk. 234. "If the question is where that [vicarious] responsibility should lie, the answer should surely point to that master in whose act some degree of fault, though remote, may be found. . . . If an accident then occurred through his [the servant's] negligence, that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice": *per* Lord Simonds in *Mersey Docks and Harbour Board v. Coggins & Griffiths, Ltd.* [1947] A.C. at 18; *cf. per* Denning L.J. in *Broom v. Morgan*, above, p. 230, n. 28.

⁵ T. B. Barlow in (1939) 56 S.A.L.J. 218: same, *The South African Law of Vicarious Liability* (Cape Town, 1939).

countries like France, Holland and the common-law countries, which make the master responsible for the act or default of his servant irrespective of the question of the master's negligence, it is not completely convincing to justify the rule by referring to this negligence.

One writer attempts to justify the law by saying that liability without proof of fault is a better way of exacting a high standard of care than liability for fault. If the liability is only for fault, the plaintiff has the difficulty of evidence to contend with, and the possibility that the court will find that reasonable care has been taken. If the master is made liable irrespective of fault, these escape-holes are closed. With human nature as it is, a penalty for not hitting a target is a better incentive to effort than a penalty for not taking reasonable steps to hit it.⁶ Although there is a measure of truth in this argument, some countervailing considerations must be mentioned. In the first place, the prevention of injury is not generally regarded as the sole aim and self-sufficient justification of the law of tort. Were it so, the argument would result in strict responsibility for harm caused by the defendant, however remotely. No one has suggested this as a serious possibility; it would be neither a workable nor a just law. The aim of deterrence is tempered by considerations of practicability and justice. Secondly, and as a particular example of the first point, in many situations it is not the master who is in the best position to prevent injury being caused by a workman, but some superior servant of the master's, such as a foreman. If the avoidance of harm justifies the imposition of legal liability to any degree, one would expect strict responsibility to be cast on all the superior servants of the offending workman. In fact the law does not do this. It is true that a foreman does not select his subordinates, and so cannot be guilty of *culpa in eligendo*. But he can be guilty of *culpa in inspiciendo*, if he is regarded as under a duty of care. Moreover, the managing director of a company is just as far removed from the law of vicarious liability as a foreman; and yet he often does choose the servants. If vicarious liability were a way of exacting care, it should be imposed upon the director, so that the damages came out of his own pocket, and not upon the company, when the damages may really come out of the profits of the shareholders, who have no kind of control over what goes on. This imposition of liability upon the company is probably the result of the mechanical logic of corporate personality rather than of any theory of vicarious liability; from the latter point of view, it is not reconcilable with any theory except the *commodum* theory. In the third place, since any person is allowed to insure himself against liability for negligence, the deterrent aspect of the law of negligence does not take priority; it is subordinated to the reparative aspect.

⁶ Warren Seavey in *Harvard Legal Essays* (1934), 433 at 448. Another writer to stress the deterrent aspect of vicarious liability was Lundstedt, *Superstition or Rationality in Action for Peace?* (London, 1925) 65-67.

From the reparative point of view, the theories so far considered fail to give a completely satisfactory answer to the question why the master should be liable in damages although he has not been at fault.

Notwithstanding all these objections, the proposition that vicarious liability tends to make masters more careful is obviously true. It is also true to say that in many cases the courts are incompetent to inquire into the safety measures that may be expected of the employer. This is because the devising of such measures generally involves an intimate knowledge of the master's business, as well as scientific and technical ingenuity, which cannot be expected of the plaintiff or his counsel in an action against the employer. More will be said upon this at a later stage of the argument.

We may now consider the relevance of the theory of the master's fault to the question of indemnity against the servant. If taken at its face value, the theory may be thought to permit the division of loss between the parties, part being allocated to the servant because of his actual fault, and part to the master because of his actual or fictitious fault. However, a mere statement of this possibility seems enough to discredit it. There is no rational ground for assessing damages on the basis of fictitious fault. Therefore, if the court is satisfied that the master is not actually at fault, the fault theory affords no basis for making him bear any part of the damages.

VICARIOUS LIABILITY AND THE ECONOMIC DISTRIBUTION OF RISK

The theories of vicarious liability so far considered are the old-fashioned ones. In the present century a new advance in thought has been made on the basis of economics.⁷ This commences with the proposition that the risk of injury or damage arising out of a business enterprise should be regarded as a running expense of the enterprise and borne by the entrepreneur, just as he bears the costs of his raw materials and overheads. He can, after all, insure against liability, just as he insures against fire. If the argument were to stop at this point, it would not be persuasive, because to say that an entrepreneur—or, to speak English, an enterpriser—can bear a risk is not to show that he should bear it. However, a notable step forward in theory was taken when it was observed, by American jurists, that the enterpriser did not himself bear the risk. Since the insurance premium becomes an item in his costs, he passes it on to his customers, by raising the price of his products or services; hence the risk is ultimately borne by his customers, who may directly or indirectly be the community at large. To turn the undeserved loss

⁷ See Wurzel in *The Science of Legal Method* (Modern Legal Philosophy Series) 409-411; Smith in (1923) 23 Col.L.Rev. 444, 716; and particularly Douglas in (1929) 38 Yale L.J. 584, 720. Denning L.J. said: "Recent legislative and judicial developments show that the criterion of liability in tort is not so much culpability, but on whom the risk should fall. Notable examples occur in the liability of a master for or to his servant, and in the escape of dangerous things": *White v. White* [1950] P. at 59.

of the individual into the loss of the community may accord with sound social and economic policy. By distributing it among the many, it becomes more easily borne.

On this view, the argument for vicarious liability is the same as the argument for any kind of social insurance. Suppose that a coal-miner is injured in a fall occurring without any negligence or breach of statutory duty. He will claim industrial injury benefit, the cost of which is borne in part by the employers' contribution, and in part by the workman's contribution out of his wages; both are passed on to the consumers of coal. Now suppose that another injury occurs through a tort on the part of the master or a fellow-servant. In this case the miner will probably recover damages in tort against the National Coal Board; and these damages (or the insurance premium) will again be passed on to the consumer. If one looks to the ultimate incidence of the liability, the lawyer's talk about tort, fault and statutory duty becomes little more than a kind of ritual. The workman will get compensation whether a tort is committed or not, and either way the consumer will pay. Only, if there was a tort, the workman will collect his policy moneys through the medium of the ordinary courts, and they will often be vastly larger in amount than what he would have got as industrial injury benefit.

The loss resulting from vicarious liability in tort is not always borne by the public at large: frequently it is borne by a section of the public. For example, the tort liability of the printer and publisher of books, say, in respect of libel, is borne by the book-buying section of the public. The tort liability of a local authority, say, in respect of its recreation grounds, is borne by the local population.⁸ Sometimes it cannot be passed on at all, as in the case of a domestic employer.⁹

The argument for making an industry bear the losses it causes goes beyond the fact that the distribution of a loss makes the loss more easily borne. The argument means that a dangerous or noxious undertaking should be made to bear the loss caused by it to the community, so that if the loss is excessive the enterprise may have to close down. Operating in this way, the law of tort provides an automatic check on the public utility of the undertaking. Damages or insurance premiums make their entry into the economic calculus; they become social costs to be added to the economic costs of the industry, and thus are taken into account by those impersonal forces that decide whether the game is socially worth the candle.

⁸ In August, 1954, Stone Parish Council had to raise a loan for £4,000 to cover part of the damages they were adjudged to pay for the fall of a child from a slide in the recreation ground. The population of Stone is less than 8,000.

⁹ The courts have shown a tendency to extend vicarious liability even in the field lying outside industry, commerce and government. An example is the remarkable case of *Ormrod v. Crossville Motor Services, Ltd.* [1953] 1 W.L.R. 1120.

Were the industry not under a tort liability, there would be no proper control of the debit side of the social balance-sheet.

This is a persuasive and in some ways a satisfactory theory. In one respect, however, it fails to explain the present law. In an action against the master for the negligence of the servant, it is necessary to prove the servant's negligence. This should not be the case if the underlying reason of the law is to impose upon an undertaking the social loss caused by its operations. A loss caused without negligence is just as much a loss as one caused by negligence. For example, neither a trading firm nor its vanmen can avoid some traffic accidents; yet these accidents are part of the social cost of the firm's activities.

There are certain reasons, however, why the objection is not so serious as might at first be supposed. Even under the existing law, the employer frequently is strictly liable, either in tort or in contract. The most important case in practice where he is not strictly liable is that just mentioned, where the servant causes unintentional injury with a motor-vehicle. Here the master is liable only for the servant's negligence. However, in highway accidents the assumption generally made is that one or other party to the accident, or both, were negligent. Thus if a pedestrian has been hit, the issue will lie between the pedestrian's negligence and the driver's negligence; or the damages may be apportioned on the basis that both were negligent. Even if there were strict liability for driving motor-vehicles, the contributory negligence of the person hit would presumably have to be considered; so that there would not be a great difference in the result from the present practice.

The argument against strict liability is that it is a complicating factor in the law of tort, and that this branch of the law is not well designed to serve the purpose of welfare economics. A person who, without any fault in himself, and merely for reasons of social insurance, is put under a liability to pay compensation for damage is not aptly called a tortfeasor. Moreover, litigation is an expensive and inefficient way of administering social insurance, which, as the experience of the Workmen's Compensation Acts shows, is best administered by specialised tribunals. To the extent that the law of tort has lost its former moral or deterrent basis, and has come to be merely a system of compulsory insurance of one person by another, with the ultimate purpose that the loss shall be borne by the community as a whole, the time is ripe for turning it into an administrative system, with the liability of the individual altogether displaced by that of the community. This has partly happened with industrial injuries insurance, but the worker is left with any common-law remedy that may be open to him. It would surely be reasonable, where there is a statutory scheme of social insurance, to leave the assured no remedy in tort except for a real tort, *i.e.*, the personal fault of the defendant.

This is a divagation. On the whole it is submitted that the justification of vicarious liability in terms of social insurance is the most persuasive, and the one that best fits the existing law. It does not work well for domestic servants, for here the employer cannot pass on his loss to a wider class of people—except indeed by insuring, in which case he must himself bear the premium. But the amount of damage done by domestic servants is insignificant in comparison with that caused in the operations of industry and commerce. In the most frequent case of damage by domestic servants, namely, the chauffeur who drives negligently, the employer is compulsorily insured.

If we look upon vicarious liability as social insurance, what is the consequence for the problem in *Lister's* case? The master, according to this theory, is liable to the stranger in order that the stranger's loss, caused in the course of the master's business, may be distributed among the master's customers, or otherwise among some substantial section of the community. Such a theory would seem *prima facie* to exclude the possibility of recourse against the negligent servant. For if he has to pay an indemnity, the loss is not distributed at all, but falls on one pair of shoulders.

Yes, but the servant has been negligent, so ought he not to bear the loss? The loss is imposed on the master for the benefit of the stranger, to meet the possibility of the tortfeasor being insolvent, but is it imposed on the master for the benefit of the wrongdoing servant himself?

In considering the answer to these questions, it is worth recalling that the law does not forbid insurance against the consequences of one's own negligence, even though such insurance destroys or weakens the deterrent effect of the law. The paramount aim of the law of negligence is to provide reparation for injury; it does not care whether the reparation comes out of the pocket of the wrongdoer himself or his insurance company. Assuming, therefore, that the servant were to continue to be liable to indemnify his master, he could validly insure against this liability. Or his master could take out a policy as trustee for him. The law would not hold such a policy void on the ground that the servant ought himself to bear the loss. Instead of insuring the servant the master could simply, by contract, waive any right of indemnity against the servant. No principle of natural justice would be affected by such a waiver. On the contrary, most persons would regard it as laudable. Before the passing of the Crown Proceedings Act it was the custom of Government Departments to "stand behind" their employees who were sued for torts committed in the course of their employment, and to pay any damages that might be awarded. This was a benefit to the victim of the tort, but it was also a benefit to the tortfeasant servant. No attempt has ever been made by a public body to seek indemnity against its own officer for a tort committed in good faith which has landed the public in liability, and it seems unlikely that

such a claim will ever be made, at least if the officer has acted in good faith.

The next point to notice is that the notion of fault as applied to inadvertent negligence involves a legal fiction, even though to some extent a necessary one. Some persons suffer from a constitutional clumsiness, lack of observation and foresight, and slow reaction-time. Even the most careful person occasionally makes a mistake; but the reasonable man of the law is not allowed to make a "negligent" mistake ever. Inadvertent negligence is stigmatised as fault because the offender is regarded as educable by law and opinion; but the truth is that he is not always educable, and, even if he is, the negligent act does not necessarily show a defect of character or of social sense. In the case of the servant there is a sanction for negligence quite independent of the law, namely, dismissal from his employment. These arguments go to suggest that the imposition upon a servant of ultimate liability for inadvertent negligence is not required either by the theory of ethical retribution or by the requirements of disciplinary education.

The findings of industrial psychologists on so-called negligence were studied some years ago in an important article by Professor Fleming James and Mr. John J. Dickinson.¹⁰ These authors reported the unanimous opinion of research workers in this field that the distribution of accidents among the population is not according to chance. Bristol estimated that ten per cent. of the working population may be responsible for seventy-five per cent. of the accidents. The most tenable explanation was thought to be that some people start with a greater liability to accident than others, *i.e.*, are "accident-prone." The reason for this may be found in their particular habits and skills, in their physical characteristics (*e.g.*, short sight), in their psychometer characteristics (*e.g.*, co-ordination and reaction-time), in their mental characteristics and attitudes (restlessness, anxiety, resistance to authority, depression, subnormal intelligence), or finally in their age and experience. When accidents are referred to these various causes, the feeling of blame is replaced by one of understanding. "Recent medical research," says Bristol, "has shown that 'accident proneness' may be an innate characteristic of some individuals and a personal phenomenon independent of any question of responsibility, conscious action or blame-worthiness."¹¹

James and Dickinson quote from Bingham¹² a simple example of this determinist approach to the problem of negligence, where intensive study showed that negligence was in fact being attributed to the wrong persons, as well as disclosing the unblameworthy character of this negligence.

¹⁰ "Accident Proneness and Accident Law" (1950) 63 Yale L.J. 769.

¹¹ "Medical Aspects of Accident Control" (1936) 107 Am.Med.Ass.Jrnl. 653, quoted by James and Dickinson, *op. cit.*, 775.

¹² "The Accident-Prone Driver" (1932) 6 *Human Factor* 158.

"During his service a bus driver had had eighteen accidents which the company after investigation had charged to the fault of the other driver. An analysis of the accidents, however, showed them all to be of the same kind—another driver had run into the left rear fender of the bus. Observation disclosed that this operator drove his bus close to the curb until he came to a parked car. He would then signal in the prescribed manner and swing the bus out into traffic. The driver of the car behind would miss the signal and hit the left rear fender of the bus as it swung out in front of him. When the driver was trained to ease out into traffic rather than swing out, accidents charged to the 'carelessness' of others ceased."

Even where it is not possible to correct the servant's tendency to involve himself in accidents, the number of accidents may be reduced by moving him to work of low accident potential. Thus one large American concern analysed the accident records of all its truck drivers to determine which were accident-prone. The accident-prone drivers were then moved to other work. At the end of seven years the company found that upon shifting one-eighth of its drivers it had decreased its accidents by 78 per cent., while the total mileage had increased slightly.¹³ This illustrates how the economic loss caused by accidents (including that resulting from vicarious liability) may stimulate employers to take far-sighted measures for their reduction. It increases the doubt whether an automatic indemnity against the servant, even if economically effective, is in accordance with either morals or public policy.

Tort damages are in any event an unsuitable means of correcting inadvertent negligence, because they are apt to be disproportionate to the fault. The slightest departure from the legal standard may involve liability in crushing damages. To impose upon the servant a liability to indemnify the master is particularly unjust where a double standard of duty has grown up—lenient for the servant and severe for the master. This double standard has been particularly evident where a jury has decided the issue. An example is *Edwards v. Railway Executive*,¹⁴ where the jury found an engine-driver negligent, though there was no evidence against him, because of their sympathy for a boy who had been injured by the train. Probably the jury would not have awarded damages against the driver if he had been sued personally; their finding of negligence was intended merely as a way of making the Railway Executive pay. In the particular case the verdict was set aside; but had it been allowed to stand, on the ground that there was some evidence to support it, it would clearly have been unjust to allow the judgment against the Railway Executive to found an action for an indemnity against the driver. The real reason why the master is made to pay damages is the

¹³ James and Dickinson, *op. cit.*, 776, quoting Johnson, "Born to Crash," *Collier's*, July 25, 1936, p. 28.

¹⁴ [1952] A.C. 737, at 745-746. For comparable American illustrations, see Albert A. Ehrenzweig, *Negligence Without Fault* (Berkeley, 1951), 20, 68-69.

inarticulate feeling of the jury that the enterpriser should assume the risk of damage as part of his overhead expenses. It is true that in order to achieve their object the jury tend to find negligence against the servant; but they do not really mean that there is negligence. Injustice would result if such a fictitious finding of negligence were treated as a real finding for the purpose of compelling the servant to indemnify.

On the other hand, there is not necessarily any injustice where the servant is the husband of the injured plaintiff. The master is liable to the wife for negligence of her husband in the course of his employment, and under the law established by *Lister's* case it seems clear that the master is entitled to an indemnity from the husband for breach of an implied term in the contract of service. In this way the husband becomes indirectly liable to his wife. There is no cause for alarm in this, because the prohibition of suits in tort between spouses is no longer felt to be required by public policy. In this particular situation the master's right of indemnity will have a salutary effect; it will put an end to the practice of mulcting the master for domestic misfortunes. It is only the most formalistic lawyer who can shut his eyes to the fact that, when damages are awarded against the master to the injured wife, the negligent husband is likely to share in their enjoyment.

However, the special problem of the domestic tort cannot govern the whole law of indemnity against servants. On the whole it is submitted that it would be fair and right, and in accordance with the modern rationale of vicarious liability, that a statute should be passed to disallow an action by the master for indemnity against the servant, where the servant has been guilty only of inadvertent negligence. It may be expected that many persons would approve this proposal, while jibbing at the logical corollary—that the servant who is sued should be given a right of indemnity against the master. Much of the urgency of the problem would disappear if motor accident liability were removed from the law of tort and turned into an avowed system of social insurance.

GLANVILLE WILLIAMS.*

* M.A., LL.D., Fellow of Jesus College, Cambridge, and Lecturer in Law in the University of Cambridge.

TORTS AND THE CONFLICT OF LAWS

*Mackinnon v. Iberia Shipping Co.*¹ was an action by a Scots engineer for personal injuries caused him on board a vessel registered at a Scottish port, but at the time in the territorial waters of the Dominican Republic. The court held that it could not grant *solatium* (meaning here general damages)² if the Dominican courts would make no such award; and also that the pursuer must aver with particularity in his pleading (if it were the case) that *solatium* would have been given by Dominican law. This makes it not inopportune to examine afresh the relevance of the place of commission of a tort to its actionability—a task less baffling now that there is a breach in the unanimity of respectable opinion that it is “elementary common sense” and “self-evident” that the law of that place “should be decisive.”³ The breach is of course Morris’s article on “The Proper Law of a Tort,”⁴ in which, however, no reason was suggested why one law was preferable to another.

SIDE-ISSUES

It seems more prudent not to assume that the answer is the same on every aspect of tortious liability until each aspect has been examined separately. English law, for example, is alone in classifying as torts infractions not only of rights common to all men as men but also of rights acquired by particular persons under previous transactions. In the latter case the law of the infraction operates only if there is a right to be infringed—and that depends upon the law governing the acquisition of the right. Thus, as Morris points out, in an action in detinue the question is always the validity of the transaction under which either party claims title⁵: the law of the place where the plaintiff demanded and was refused may be relevant to the effect of the demand and refusal, but not to the effect of the previous transfer. Similarly, it was held in *Lister v. McAnulty*⁶ that if by the law of his domicile (Massachusetts) at the time of marriage the plaintiff took by that marriage no right to his wife’s services, he could not recover for

¹ 1955 S.L.T. 49.

² Lord Sorn pointed out that this was not the same as the *solatium* claimed by a relative on the victim’s death, but the case was argued on the assumption that it was a separate cause of action and not merely a separate head of damages.

³ Cheshire, *Private International Law*, 4th ed., pp. 256 and 257. Compare Wolff, 2nd ed., p. 485, and Schmitthoff, 2nd ed., p. 144.

⁴ (1951) 64 *Harvard Law Review* 881, foreshadowed by a note in (1948) 12 M.L.R. 248, which in this respect was considered “absurd” by Gow in (1949) 65 L.Q.R. 313, 316.

⁵ The cases are too numerous to cite.

⁶ [1944] 3 D.L.R. 673 (appeal from Quebec).

the loss of those services merely because the law of the place where she was harmed allows such an action. Similarly again, in an earlier action in Quebec—*Dupont v. Quebec S. S. Co.*⁷—it was held that an action lay for loss of support under Lord Campbell's Act, the scene of the accident being an English vessel, but that the English defence of common employment was not available, for its English explanation was an implied waiver by the employee in his contract of service; and in that case the contract of service was governed by the law of Quebec, which knew of no such implication.⁸

A second point to be distinguished from the main problem starts with the decision of Lord Nottingham, the father of English private international law, in *Blad's case*.⁹ There an action was brought against a Dane for seizing the goods of certain Englishmen traded to Iceland. The Dane pleaded a monopoly of the Icelandic trade, granted by the King of Denmark, and Lord Nottingham said that "whatever was law in Denmark would be law in England in this case, and would be allowed as a very good justification in the action": there was, therefore, no need for the Privy Council to interfere in the action. From this may be drawn the principle that a foreign Government's authority to behave in a manner otherwise tortious is a good defence to a claim founded on such behaviour, if committed within the territorial jurisdiction of the licensing power. This defence failed in four later English cases, but only because it was not made out,¹⁰ and was again successful in *Dobree v. Napier*¹¹ and in *R. v. Leslie*.¹² In the latter case it was held that wrongful imprisonment on a British vessel was no crime within the waters of a foreign Government procuring it, though it became a crime the moment those waters were exchanged for the high seas. The three cases named above were the express—and the only express—foundation for the second branch of Willes J.'s rule in *Phillips v. Eyre*¹³ that for the plaintiff to succeed in England

⁷ (1896: Review), 11 Q.R. 188.

⁸ Dissent from this part of the decision was adumbrated in *Story v. Stratford Mill Building Co.* (Ontario, 1913: App.), 30 O.L.R. 271; but that case was decided on the basis not of common law liability, but of the local Workmen's Compensation Act. Common employment was also raised as a defence in *Canadian National Steamships Co. v. Watson* (Quebec, 1938: Can.) [1939] S.C.R. 11: it was there treated as a matter for the law of the place of accident, but no one argued for anything else.

⁹ (1673), quoted at 3 Swans. 603 from Lord Nottingham's MS.

¹⁰ *Comyn v. Sabine* (1737), quoted at 1 Cowp. 169; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161; *Rafael v. Verelst* (1775–1776) 2 W.Bl. 983 and 1055; *Collett v. Lord Keith* (1802) 2 East 260. Lord Mansfield said expressly in *Mostyn v. Fabrigas* (above) at p. 175, that "Whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried."

¹¹ (1836) 3 Bing.N.C. 781.

¹² (1860) 8 Cox C.C. 269.

¹³ (1870) L.R. 6 Q.B. 1, 29. Cockburn C.J. in the Queen's Bench (1869) L.R. 4 Q.B. 225, 240 and 241, had also founded himself on the two later cases and nothing else.

"the act must not have been justifiable¹⁴ by the law of the place where it was done." That indeed was a case not of prior authority but of subsequent ratification; but at both stages it was said that where the one would have been effective so should the other be; and Willes J. expressly put the two side by side, viewed as the acts of a private principal, in an earlier passage of his judgment.¹⁵

If a person may be authorised to do harm to another, and if the past doing of harm may be ratified, it is only a small step to say that the victim's claim may be discharged otherwise than by ratification—for instance by prescription.¹⁶ It is on the basis (though not always very clearly enunciated) of the time-bar in the English Fatal Accidents Acts being prescriptive rather than a limitation that the Scots courts have dismissed actions for death caused in England more than twelve months earlier.¹⁷

But neither the cases of prior authority, nor those of subsequent ratification or discharge, afford much guidance on the question of a difference between two general laws of tort, for they are only instances of recognition of an executive act—though sometimes made by legislative process—as operating within the government's territorial jurisdiction.¹⁸ It is a little fanciful to say that everyone is *authorised* to commit in England what would otherwise be the actionable wrong (as it is in Scotland) of insulting a man to his face.

There is a third type of case founding no general principle, though Batifol uses it as such a foundation.¹⁹ Rules fixing the respective rights of motor-cars and pedestrians, or of motor-cars

¹⁴ The ancestry of the rule demonstrates—if demonstration were necessary—that "justifiable" refers to the technical sense of "justification," namely a defence to what is *prima facie* a good cause of action. This is the answer to Cheshire's remarks at p. 261 of his 4th ed.

¹⁵ At p. 23. The only possible way (it is submitted) of explaining *Carr v. Francis Times* [1902] A.C. 176, is to say that the Sultan of Muscat had ratified the seizure complained of. The defendant, relying on the Sultan's authority to seize vessels running guns to Persia, had seized a British ship laden with arms destined (as the jury found) for Muscat itself. The Sultan later confirmed the finding of a body before which the plaintiffs had not been represented that the seizure was justified by his previous authority, and the House of Lords held that the Sultan's will being law in Muscat and its territorial waters, if he said the plaintiffs' vessel was covered by his previous proclamation then by the local law it was so covered.

¹⁶ Both Cockburn C.J. ((1869) L.R. 4 Q.B. 225, 242) and Willes J. ((1870) L.R. 6 Q.B. 1, 30) spoke of discharge of an existing right, Cockburn C.J. putting its validity on the victim's "owing allegiance" to the law of the place of which he was an "inhabitant"—which, if taken literally, would not necessarily be the place of commission—and Willes J. making a comparison with the destruction of contractual rights by a discharge in bankruptcy.

¹⁷ *Goodman v. L.N.W.Ry.* (1876) 14 S.L.R. 449, where Lord Shand held that limitation here meant that only a limited right had been given. His decision was formally approved and applied by a majority of six to one in *M'Elroy v. M'Allister* 1949, S.C. 110, but Lords Mackay and Russell spoke of the loss of the right, and Lord Keith of Avonholm (dissenting) required proof that the right was barred and not merely the action.

¹⁸ *R. v. Leslie* (above) is therefore no support for *Mackinnon v. Iberia Shipping*, the theme of this article.

¹⁹ *Droit International Privé*, pp. 555-556.

between themselves, are purely local and must be observed by all in the relevant locality. The fact that breach of such regulations may constitute a crime need not concern us here; but breach followed by damage to another may also constitute a tort. Thus, if an English car runs into another English car in France the driver straying from his right side must pay when sued in England, no matter what the English rule may be. But that is not because by the French law of delict driving on the left constitutes "fault": it is because the English law of tort says that nonconformity with local rules is negligence.²⁰ A prudent driver will conform (apart from any penal sanction) because the overwhelming majority of participants in any traffic complex belong to the place, and would never think of following any other system themselves or think of any other driver following any other system. A driver acting otherwise than others expect is asking for trouble—and that is another way of saying that he is negligent.

HISTORICAL ORIGINS

It is sometimes said that Bartolo was the earliest to say what law should govern a tort, but this is more than doubtful. His second question²¹ is: "If a foreigner offends here, should he be punished according to the local laws of this state?" and the examples he gives show clearly that he is referring to penal, not to civil delicts. The eighth question²² is whether a subject offending abroad may be punished at home; and here, since he gives no examples and speaks of delicts committed against another subject, it is just possible that despite the exact similarity of language in each case he had in mind also the civil consequences of a delict. His answer was that the offending subject could be punished at home under domestic law if expressly extended to acts done abroad—that is, that such an extension would be within the city's legislative jurisdiction—while if there were no domestic law so extended then either the common law or that of the place of commission should govern the decision.²³

²⁰ So Selwyn L.J. said in *The Halley* (1868) L.R. 2 P.C. 193, 203: "In the case of a collision on an ordinary road in a foreign country . . . the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of foreign law as . . . one of the facts upon which the existence of the tort or right to damages may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established." So with navigation in a canal—*The Karen Toft and the Isaac Carter* [1955] 2 Lloyd's Rep. 120 (the Kiel canal).

²¹ Lainé, Vol. I, p. 137.

²² Lainé, Vol. I, pp. 161–162.

²³ It is a far cry from this to Beale's assertion (at p. 1888), apparently summarising the second question rather than the eighth, that "Torts and crimes are governed by the law of the place of acting." Cheshire is apparently referring to Bartolo when he says (4th ed., p. 257) that "it was the view of the statisticians" that the local law governed torts. Batiffol is much more candid: "The delicts contemplated," he says at p. 238, "are above all penal delicts; but," he adds, "the idea of the law applicable to civil delicts is implicit in" this teaching.

Whether or no Bartolo was referring here to tort, he gave no reasons, and no other writer before the nineteenth century referred with any precision to tort—which explains why nothing on the point is to be found in Story,²⁴ whose first edition was published in 1834, and no more than a passing allusion in Foelix.²⁵

The question had been raised in Scotland as early as 1788 in *Graham v. Stevenson*,²⁶ an action brought by the Scots owner of an inn in Cumberland against his ex-tenant for conspiring with other inn-keepers to remove the custom of the inn to another inn of his own at Gretna. There was an objection to the jurisdiction on the ground that, the action not being in contract “but on an alleged delinquency or conspiracy [the] matter must depend on the practice and usage of the inhabitants of England.” As an objection to the jurisdiction this was overruled,²⁷ and we are not told what happened to the contention as a substantive defence; but in two later actions for maliciously procuring the judicial arrest of the pursuer in England English law was not mentioned.²⁸ In 1849 a similar action²⁹ failed in Scots law for insufficiency of the allegation of malice, but the question was agitated whether the necessity of malice in English law might also be a good defence: the judges differed and none gave any reason.

This new awareness of the problem perhaps sprang from the writings of von Wächter, who in 1842 was the first jurist really to deal with a conflict of laws in the matter of tort. He considered the court's own law to be the primary test³⁰ but made “an exception for the case where the foreign state, in whose territory a subject is injured, declares the act to be such as does not ground a claim for recompense and satisfaction.”³¹

²⁴ The brief para. 307d was first added by Judge Redfield to the 1865 ed.

²⁵ His first edition in book form was published in 1843, but that was hardly more than a reprint of an earlier series of articles. On p. 542 of the second (1847) edition, s. 551, he points out that “the limitations imposed by the . . . Code of Criminal Procedure on public prosecutions in the matter of delicts committed abroad do not apply to a civil action arising out of the same delict”; and on p. 571, s. 599, that where the law of the forum imposes a different punishment from that of the law of the place, “if it were necessary to follow the principles accepted in civil questions, the law of the place where the act was done would be solely applicable”; but the reference to civil questions means contracts, as appears from the context.

²⁶ (I.H.), Hume's Dec. 250.

²⁷ The claim for foreign law in the contemporary *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, was also directed to the exclusion of the English court's jurisdiction.

²⁸ *Shaw v. Robertson* (1803) Mor.App. I, *Voc. Lis Alibi*; *Hallam v. Gye* (1835) 14 S. 199. English law was referred to in the latter case, but only to show that but for the defender's lies the arrest would not have been made. In an English case too—*Ward v. Smith* (1830) 6 Bing. 729—the fact that the publication of the alleged libel had been in Sierra Leone did not lead either party to refer to the law of that colony.

²⁹ *Callendar v. Milligan* (I.H.), 11 D. 1174.

³⁰ *Archiv für die civilistische Praxis*, xxv (1842), 361–419, at p. 389.

³¹ The same, at p. 395, as quoted by Bar, 1st ed., translated by Gillespie, at p. 361. Lorentzen is evidently wrong in (1931) 47 L.Q.R. 483, Selected Articles 360, 365, to say that von Wächter admitted no answer to the *lex fori*.

There can be little doubt either that von Wächter's work was the inspiration of the following note which was introduced without a trace of justifying argument by Willes³² and Keating as editors of the fourth (1856) edition of Smith's *Leading Cases*³³: "There seems to be no reason why aliens should not sue in England for personal injuries done them by other aliens abroad *when such injuries are actionable both by the law of England and by that of the country where they are committed.*"³⁴ Willes J. had already been elevated to the bench when that edition was published; and when he came to enunciate the double rule in *Phillips v. Eyre*³⁵ he had shifted his position a little³⁶: he no longer required the injury to be "actionable" by the local law; but only that it "must not have been justifiable." It is important to notice that both von Wächter and (after reflection) Willes J. regarded foreign law as a defence merely, and not as governing primarily.

Von Wächter's views were not immediately accepted. Savigny in 1849 would allow the court no exception to its own law,³⁷ a doctrine which was criticised both by Westlake in 1858³⁸ and by Bar in 1863,³⁹ both being in favour of the place of commission. In England strong judicial doubt was expressed in 1861 and 1862⁴⁰ whether a foreign local law that the harm complained of was *damnum sine injuria* would bar an English action; and there has in fact—perhaps because English law offers less causes of action in tort than other laws—been no instance of foreign law being held to be a good

³² Willes J. was well known for his knowledge of Continental law (*Dictionary of National Biography*); and was also able to read German (Inquest in *The Times*, October 4, 1872).

³³ Vol. I, p. 560.

³⁴ Italics supplied. This note was quoted verbatim with approval in *The Halley* (1868) L.R. 2 P.C. 193, 202–203.

³⁵ (1870) L.R. 6 Q.B. 1, 29.

³⁶ Probably owing to contemplation of the problem raised by *Scott v. Seymour* (1862) 1 H. & C. 219, to the decision of which he had been a party.

³⁷ Vol. VIII of the *System of Modern Roman Law*, s. 374 C., p. 205 of Guthrie's translation.

³⁸ 1st ed., s. 238, p. 222.

³⁹ 1st ed., s. 88.

⁴⁰ *Scott v. Seymour* (1862) 1 H. & C. 219. Pollock C.B. asked in argument at p. 227: "Suppose in a foreign country there was no redress for slander, would that prevent an Englishman who was slandered from bringing an action in this country?" And Crompton J. said in argument in the Exchequer Chamber (at p. 231) "You must contend that supposing no action could have been maintained in a foreign country for criminal conversation committed there, no such action could formerly have been maintained in this country." In the judgments in the Exchequer Chamber Wightman J. (at p. 234) confined himself to a foreign law making the harm criminal but not actionable, and thought that could be no defence at least between British subjects; while Blackburn J. (at p. 237) doubted if such a law could be a defence whether the parties were British or foreign. Of the other three judges Crompton J., despite his remark in argument, refused to commit himself; Williams J. (at p. 235) was "not prepared to assent"; and Willes J. (at p. 236) was "far from saying that I differ." The question was in fact held not to have been properly raised by the pleadings.

defence⁴¹ except as an authority or ratification in the particular case, and on the peripheral question of vicarious liability.⁴²

In Scotland it was positively decided as late as 1878, in *Horn v. North British Ry.*⁴³ that English law was no defence to an action against a Scottish railway company for *solatium* for a son's death, though the accident had occurred in England; but in 1891 it was held a good defence to an action by a seduced woman,⁴⁴ and in 1904 to an action for insult,⁴⁵ the harm complained of having been inflicted in England, and in 1933 there was a conclusion directly opposite to *Horn's* case on the same point.⁴⁶ *Horn's* case has now been overruled by a court of seven judges, again on the same point.⁴⁷

In France, when the question first arose in 1885, there was at least a tendency to regard foreign law as irrelevant⁴⁸; and some years later a Frenchman advertising in England as "Champagne" wine not made in that province had to pay damages to the Syndicat des Vins de Champagne although such advertisement was argued not to be actionable in England, on the ground that he made his profit in France.⁴⁹ But (apart from special limits on liability) a foreign law making contributory negligence a defence has been twice respected,⁵⁰ and so now has a law throwing on the plaintiff

⁴¹ But the Privy Council in an appeal from Quebec—*Canadian Pacific Ry. v. Parent* [1917] A.C. 195—gave effect to a special local defence to an action for loss of support, not available in Quebec law, that the deceased would himself have had no right of action; and in two appeals from Saskatchewan in 1922—*Walpole v. Canadian Northern Ry.* and *McMillan v. Canadian Northern Ry.* [1923] A.C. 113 and 120—to an abolition of the right of action by the local law, but not by the law of Saskatchewan, in favour of a claim in the nature of an insurance: there was no longer any question of a *wrong* against the plaintiff, whether civil or criminal.

⁴² Even on that point the case which is supposed to establish that Spanish law was a defence was decided on the basis of an agreement that the court should decide as if it were sitting in Spain—*The Mary Moxham* (1876) 1 P.D. 107: for the agreement see p. 110. The defence now rests on the authority of two decisions at first instance, *The Arum* [1921] P. 12, and *The Waziristan* [1953] 1 W.L.R. 1446.

⁴³ (1878) 5 R. 1055. It was suggested, *e.g.*, by Lord Mackay in *M'Elroy's* case (below), that this was a decision on contract; but in fact there was no privity of contract, and the question of liability in delict was squarely faced.

⁴⁴ *Rosses v. H. H. Sir Bhagwat Singhjee*, 19 R. 31.

⁴⁵ *Evans & Sons v. Stein & Co.*, 7 F. 65.

⁴⁶ *Naftalin v. L.M.S.Ry.*, 1933 S.C. 259.

⁴⁷ *M'Elroy v. M'Allister*, 1949 S.C. 110.

⁴⁸ *Compagnie d'Assurances La Baloise c. Wallemberg* (1885: C.A. Paris; 1888: Civ.) [1888] Dalloz, i. 305. See the motivation of the Court of Appeal: the Court of Cassation avoided decision, but seemed ready to respect foreign law if it had been proved.

⁴⁹ *Ackerman-Lawrence c. Syndicat des Vins de Champagne* (1891: C.A. Angers; 1894: Civ.) [1895] Dalloz, i. 71. This was again in the Court of Appeal—in the Court of Cassation the point of English law seems to have been dropped. This is the case cited by Lorentzen in (1931) 47 L.Q.R. 483—Selected Articles 360, 366, note 22.

⁵⁰ *Choquet & Cie c. Leipziger Bank* (1896: Tr.Comm.Seine; 1899: C.A. Paris), 24 Clunet 124; 28 Clunet 128; *Bloil c. Muller* (1934: C.A. Colmar), 63 Clunet 626. Neither of these cases is reported in Dalloz or Sirey, and Clunet is more of comment than of the court's motivation.

the burden of proving negligence,⁵¹ though in French law if a thing does harm it is for the person in charge to prove no negligence.

In America foreign law was admitted as early as *Smith v. Condry*,⁵² where the English exemption of a shipowner from the fault of a compulsory pilot was agreed by both sides to be applicable: the question at issue was whether the fault was of the pilot or of the owner's own servants. Whatever else may be said about later American decisions, no one can complain that they have paid too little attention to foreign law.

FALLACIOUS EXPLANATIONS

Current explanations of the relevance of foreign law fall into two groups, the first being the right of the local community to decide and the second the creation of liability by the local law. In his first edition of 1858, Westlake discussed whether the relevant law of a multiple tort was that of the place of acting or of the place of harmful consequence, and said⁵³: "The damage is not an injury unless it results from conduct *prohibited* by the law which governs the agent." Bar, in 1862, criticising Savigny's view that the court's own law was to be applied exclusively, said⁵⁴ that this demanded *obedience* to the *lex fori* by everyone in the world. Cheshire refers⁵⁵ to the law "to which the defendant owed *obedience* at the decisive moment." And Batiffol also refers⁵⁶ to the law of delict as a "*regulation* of human actions." But this is to fall into the trap which Savigny was careful to avoid: "This whole question," he said,⁵⁷ "is nearly akin to that of penal law, whether a crime committed abroad is punishable by our courts, and with what penalty. Yet the two questions must not be identified, because in penal law, as part of the public law, considerations are to be kept in view of which no account is taken in obligations arising from delicts."⁵⁸

To talk of a tort as a prohibited act, or as a disobedience to law, is indeed to confuse it with a crime. Defamation, for instance, is not forbidden: it is one of the kinds of harm which the courts

⁵¹ *Lautour c. Guiraud* (1948: Civ.) [1948] Dalloz, J. 357. The Court of Cassation reversed the Court of Appeal, Lerebours-Pigeonnière being the rapporteur. Compare *The James McGee* (U.S., 1924: Distr.), 300 Fed. 93.

⁵² (1843) 1 How. 28 (U.S.).

⁵³ s. 240, p. 222: italics supplied.

⁵⁴ 1st ed., s. 88: italics supplied.

⁵⁵ 4th ed., p. 256: italics supplied.

⁵⁶ *Droit International Privé*, p. 555: italics supplied.

⁵⁷ System, Vol. VIII, s. 374 C., p. 207 in Guthrie's translation.

⁵⁸ In view of this express distinction, Lorentzen is clearly wrong (Selected Articles, p. 365) to attribute Savigny's views to an analogy with crime. When Savigny says at p. 205 of Guthrie's translation that "the laws relating to delicts are always to be reckoned among the coercitive, strictly positive, statutes," he is referring to what is now called "*ordre public international*": the "*coercion*" (if that is a proper translation) is on the court, not on the parties.

will (if invoked) help a private person to prevent; or, if it is too late for that, they will help to restore him at the expense of his defamer to the same financial position as before. The Austinian definition of law as a series of commands can be justified in private law only by addressing the commands to the courts: if a tort were a disobedience to a prohibition it would *ipso facto* be a punishable crime.

Another explanation in this group originates in Westlake's second edition of 1880. "The defendant," he said,⁵⁹ "may plead that if his act disturbed the social order of any country it was that of the country where it was committed, the law of which is therefore the best authority on the subject."⁶⁰ Hancock says⁶¹ that the commission of a tort abroad "is of more acute concern to the foreign community than to the community of the forum"; and Cheshire quotes⁶² this with approval. But this again, with respect, is to mistake the essential nature of the law of torts, which is a part of private and not of public law: to say that behaviour disturbs a country's social order, or that it is of acute concern to a community, is to say that it is, or ought to be, criminal. It is indeed in the public interest that there shall be a law of tort, the public interest involved being the avoidance of private vengeance disturbing the public peace⁶³; but no individual tort as a tort is the legitimate concern of anyone but the parties.

Moreover, it is by no means always true that the community is interested legitimately or otherwise in behaviour within its territory. Morris⁶⁴ asks whether Quebec law can possibly be relevant to the behaviour of a camp of American children fifty miles from any other person, merely because the camp is geographically in the province of Quebec; and we might go further and ask what possible concern it could be to the people of France that one Englishwoman insults another, both being in a charabanc with none but English occupants, merely because it is driving through France—or what concern it can be to the people of England that an exiled Czech official makes in England to the exiled Czech Government a confidential adverse report on another Czech official in Cairo⁶⁵—or to the people of the Dominican Republic that a Scottish engineer is injured in a Scottish vessel by reason of a faulty system of work there in force and by the negligence of a fellow-servant,

⁵⁹ p. 221; and p. 236 of the 3rd (1890) ed.

⁶⁰ So also a note, quoting Laurent, *Droit International Privé*, in [1888] Dalloz, i. 305, 306: "The act involves injury to the public order of the country where it was done."

⁶¹ p. 62.

⁶² 4th ed., p. 257.

⁶³ So Weiss, 2nd ed., Vol. IV (1912), p. 416.

⁶⁴ (1951) 64 Harvard L.R. 881, 885.

⁶⁵ The facts of *Szalatno-Stachy v. Fink* [1947] K.B. 1. Somervell L.J. (as he then was) said that it would "make an inroad on a very fundamental principle" to apply any but English law, but he did not say what that principle was, and seems to have been thinking of a rule rather than a principle. The rejection of Czech law was unnecessary to the decision.

merely because the vessel in question happened to be just in Dominican waters at the time.⁶⁶ There is indeed a community which is affected in the sense that its feelings may be engaged, but it is not a territorial community.

The other fallacious explanations are variations on the theme that a local law "creates" the defendant's liability. The first expression of this idea is also to be found in Westlake's first edition of 1858. "Every authority," he said,⁶⁷ "which traces the force of a contract, or of an obligation *quasi ex contractu*,⁶⁸ to the local law under which the agreement or the act is made or done, must of course be of equal avail to trace the obligation arising from a delict to the local law under which it is committed." Even assuming that the force of a contract arises from a local law, "what is analogous to the commission of a tort is the breaking, not the making, of a contract"⁶⁹; and no one suggests that the law of the place where a contract is broken is the source of the obligation arising from the breach. It is rather assumed that an obligation must arise from the breach if a right was antecedently created by the making of the agreement; and one might press the analogy far enough to say that an obligation must arise from an insult if the victim had antecedently a right not to be insulted. But to ask whether the victim had that right is analogous to asking whether a party to a contract has in general any right that it shall be kept: if that question arose in a case on contract it would certainly not be answered by reference to the place of breach. There is, however, no need to take the matter further, for in spite of a similar view expressed by Willes J. in *Phillips v. Eyre*⁷⁰ Westlake himself in his second edition said briefly⁷¹: "The international law of torts may . . . best be considered independently of the ideas suggested by contract."

The view that an obligation is created by the law of the place of commission has, however, been maintained without reference to the analogy with contract, and in this form is usually associated

⁶⁶ The facts of *Mackinnon v. Iberia Shipping Co.*, 1955 S.L.T. 49.

⁶⁷ p. 222, s. 237.

⁶⁸ Huber seems to have thought local law irrelevant to quasi-contract—see the Latin text appended to Lorentzen's article on Huber, p. 168 of his *Selected Articles*. The English text ought to read: "at any rate to compel delivery, for . . ." and not "not even to compel delivery."

⁶⁹ Paton on *Jurisprudence*, 2nd ed., p. 212; and (p. 213): "What is quite illogical is to recognise that there is primary right where contract is concerned, but to fail to appreciate this in tort."

⁷⁰ (1870) L.R. 6 Q.B. 1, 28: "A right of action, whether it arise from contract governed by the law of the place or [from] wrong, is equally the creature of the law of the place and subordinate thereto": in the absence of a contrary intention a contract "falls under the law of the place where it was made; and in like manner the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law." According to Falconbridge in (1945) 23 Can.B.R. 309, 312, "this flirtation with the acquired rights theory is not to be taken too seriously in view of the terms of the two conditions stated" on the next page of the report.

⁷¹ p. 220, repeated in the third and fourth editions (1890 and 1905) at pp. 235 and 257 respectively.

with the name of Holmes J.,⁷² but Foote had already in 1878 said⁷³ (without explanatory argument) that "the law of the place where an act is done defines its character altogether,"⁷⁴ and pronounces once for all whether it is wrongful and actionable or legal and innocent"⁷⁵; Westlake in 1880,⁷⁶ though he also gave another explanation, spoke of a "civil right acquired by the plaintiff in the primary jurisdiction"; Dicey in 1896⁷⁷ included a right of action in tort under the head of acquired right; and Pollock in 1897⁷⁸ found it "an anomaly that A should, in respect of acts done in Brazil, acquire rights in England not given him by the law of Brazil." Whatever the metaphysical attractions of an obligation springing to birth out of the soil at the possibly unsuspecting actor's feet and hanging itself round his neck like an albatross, there seems to be no escape from two problems. The first is that presented by a multiple tort—for instance the negligent emission of sparks from a train in Kansas which blow across the state line and set fire to a barn in Oklahoma. Kansas law creates no liability from the mere emission of sparks, and has no jurisdiction to create a liability from damage caused in Oklahoma—and so with the law of Oklahoma.⁷⁹ This was indeed the argument of counsel for the defendant in *Otey v. Midland Valley Railroad Co.*⁸⁰; and when the court (rightly, it is submitted) brushed this argument aside, it brushed with it the whole of the obligation theory.

The second problem arises from injuries caused where there is no local law, ~~or no civilised local law~~. Bar thought⁸¹ that in that case the personal law should govern, but he did not say whose personal law, nor did he explain why, if that were the solution,

⁷² *Slater v. Mexican National Railroad Co.* (1904) 194 U.S. 120, 126; and later in *Western Union Telegraph Co. v. Brown* (1914) 234 U.S. 542, 547.

⁷³ 1st ed., p. 396; 2nd ed. (1890), p. 480. His views are clearly drawn from those of Willes J. quoted in note 70, above.

⁷⁴ So Wolff, 2nd ed., p. 495. At p. 485 he says that "if an act . . . has created an obligation at the place where it was done it seems at first sight a matter of course that such obligation should be recognised and enforced wherever the wrongdoer may be found."

⁷⁵ Pontifications like this provoke the question: "Why on earth?"

⁷⁶ 2nd ed., p. 225; 3rd ed. (1890), p. 240.

⁷⁷ 1st ed., p. 23 (6th ed., p. 12). So also a protesting note by Despagne to *Morley-Unwin c. Reyneri* (France, 1894: Req.) [1894] Dalloz, i. 521.

⁷⁸ (1897) 13 L.Q.R. 233, 234, commenting on *Machado v. Fontes* [1897] 2 Q.B. 231.

⁷⁹ Walter Wheeler Cook (*Logical and Legal Bases*, p. 316) suggests that the obligation theory could still operate if both laws agree—which they did in the case from which these facts are taken; but that supposes a mystical union of the two laws for a joint creation of liability. On this whole problem see *passim* this chapter in his book reproduced from (1935) 35 Columbia L.R. 202. The courts in fact, as he points out (at pp. 331–332) readily enforce a right as if "created" by a law which, in the particular case, deliberately refuses to "create" it, thinking some other law competent. This may avoid the thorny problem of *renvoi*, but it does not tell us how the right has, in the particular case before the court, come into existence.

⁸⁰ (1921) 197 Pac. 203 (Kansas).

⁸¹ For the first time in the 2nd ed. (1889), s. 287.

personal law should be irrelevant elsewhere. Foote said⁸² that "the *lex fori* must necessarily be followed, in the absence of any other with authority to speak"; and according to Dicey,⁸³ "Collisions at sea . . . since they take place outside the territorial jurisdiction of any state, are in an English court to be treated as governed by English law." But this, with respect, is not at all the logical consequence of the theory, which is that, if there is no law to characterise the act as wrongful, or to create an obligation in consequence of it, then the act is not wrongful nor is any obligation created. If the obligation requires creation, as the explanation assumes, by some local law, then in the absence of any local law with jurisdiction in parturition no obligation exists—which is absurd.⁸⁴ It need only be added that the explanations founded on prohibition and public interest, though destroyed by other arguments, are equally invalidated by torts on the high seas.

It is indeed self-evident that the plaintiff's right needs to be created, for it cannot exist without at some time having begun to exist; and it is equally self-evident that a legal right cannot exist without law. But from these two premises one cannot draw the commonly accepted conclusion that the plaintiff's right is created by law: that is a misunderstanding of the function of law seen as a general body of principles. Legislative machinery can indeed create—and destroy—private rights: such laws incur the opprobrium of retroactivity, and cannot operate beyond the territorial (or possibly personal) jurisdiction of the legislator. But a general body of law is contemplative rather than creative, and the accurate description of the creation of a legal right is that it is created *by* acts, omissions or events *in the opinion of* some law.⁸⁵ This is the explanation—and (it is submitted) the only possible explanation—of how rights arise out of collisions on the high seas. It is clear that such a law knows no territorial barriers: it is beyond a legislator's jurisdiction to create rights in another country, but not to have an opinion that particular harm deserves compensation wherever it may have been inflicted,

⁸² 1st ed., p. 398; 2nd ed., p. 481.

⁸³ 1st ed., p. 663 (6th ed., p. 806). He suggests that the relevant defence for a tort in an uncivilised country is the personal law of the *plaintiff*.

⁸⁴ Compare Goodrich (2nd ed., p. 220—the passage does not occur in the 3rd ed.) on a tort committed in Massachusetts: "Massachusetts law should determine the legal consequences of [the defendant's] act, for it was the only law in control where the transaction complained of took place. . . . If Massachusetts law gave [the plaintiff] . . . no claim against [the defendant], he has nothing to enforce when he sues in New York, and should not be allowed to recover." So also, it is submitted—indeed *a fortiori*—where there was no law "in control," and therefore none to give the plaintiff his claim. It could possibly be argued that the law of all countries extends equally to the high seas (or should it be only all littoral States?); but the consequence of that would be that the victim has as many rights as there are countries, which is equally absurd.

⁸⁵ A similar verbal confusion is the now deeply rooted phrase that a tort (or contract) is governed by a particular law: more accurately it is the decision of the court, not the transaction, which is so governed. This correction removes one more plank from beneath the feet of those who explain the relevance of foreign law in terms of territorial jurisdiction.

or to instruct his courts to enforce that compensation where there is no excuse. In other words, to apply his own law unless the defendant excuses his actions by foreign law.

THE TRUE EXPLANATION

Foreign law then is relevant neither as having supplied the obligation's birth certificate, nor as being publicly connected with the plaintiff's harm. That is not to say that it is not relevant at all; but the reason is less formal and more founded on fairness. The principle is that the defendant ought not to be put at a disadvantage by being judged by an unexpected law. In *Goodman v. L.N.W.Ry.*⁸⁶ at least part of Lord Shand's reasoning was the injustice of subjecting the defenders to Scots law "because of the accidental circumstance of the defenders being or becoming liable to the jurisdiction of the courts here"—they were made liable by service of process on a clerk in Glasgow for Scotch traffic on their English line, and by arrestments. The prolific Westlake seems in 1880⁸⁷ to be under the influence of Savigny in contemplating only two proper courts, that of the occurrence and that of the defendant's residence. Of these he thought that the place of acting was "the more appropriate" forum, "because the injured person may fairly desire the quickest and easiest redress without having to follow the wrongdoer to his own country"; and thought that the law of that court should therefore be considered together with that of the trying court—Westlake from 1880 onwards accepted the double rule. Without pondering too deeply on the precise significance of "fairly," we may observe that this reason will not always indicate the law of the place of commission; and indeed in *Mackinnon's* case⁸⁸—or any other case of temporary absence from one's own country—the "quickest and easiest redress" was obviously to be found in Scotland and not in San Domingo.⁸⁹

A century earlier it had been argued for the defendant in *Mostyn v. Fabrigas*⁹⁰ that he ought not to be tried by the law of England for an assault committed in Minorca, for that "would be the highest injustice, by making a man who has regulated his conduct by one law amenable to another totally opposite." Lord Mansfield did not reject this argument, remarking only that the pleading had set out one defence under the local law, and the evidence sought to establish another. Although the law there in question was a special authority rather than a different general law, the remark itself has a general validity, at least for intentional torts. The

⁸⁶ (1876) 14 S.L.R. 449.

⁸⁷ 2nd ed., p. 220; 3rd ed., p. 236.

⁸⁸ 1955 S.L.T. 49.

⁸⁹ Another objection to this way of putting it is that it all too easily slides into an assertion of some right in the court of the place of commission to respect elsewhere—an assumption again of a public interest in a purely private matter.

⁹⁰ (1774) 1 Cowp. 161, 165.

question remains, however, why a man should regulate his conduct by one law rather than by another—a question neither of metaphysical jurisprudence like the creation by law of liabilities, nor of territorial jurisdiction involving a duty to obey, but of human instinct, or, as an English lawyer might prefer to put it, the expectation of a reasonable man. The instinct relevant here is the feeling that when in Rome one should do as Rome does⁹¹: that such a feeling exists is not primarily a question of law but an undeniable fact. But it is equally undeniable that visitors do not consider themselves bound by the precept in all circumstances: even if they are resident they may feel that if the company consists solely of their fellow-countrymen the proper behaviour is that of their own country, while a passenger by air, for example, alighting for an hour on a foreign airfield and sheltered with his fellow-passengers away from contact with the local population, would hardly feel that the precept applied to him at all.

Lerebours-Pigeonnière perhaps expresses the same idea in a more abstract form when he says⁹² that “fault, a moral idea, must be judged according to the environment in which the defendant acts”; but it must be remembered that geographical environment has no moral significance: it is the company in which the defendant acts that is his environment for this purpose, and the question “Who is my neighbour?” must be answered differently according to the nature of the act in question. That is why Wightman J. in *Scott v. Seymour*⁹³ was so reluctant to admit the relevance of Neapolitan law to an assault by one British subject on another in Naples, while Montague Smith J. (as he had been) would have been perfectly willing in *Hart v. von Gumpach*⁹⁴ to apply Chinese law to a libel by one British subject on another in China, both being servants of the Chinese Government and the libel being a report to that Government. In the first case only the parties (it seems) were involved, while in the second the setting was entirely Chinese. It seems necessary, moreover, to distinguish, as was impossible on the demurrer in *Scott v. Seymour*,⁹³ between cases where the parties are together because they are fellow-countrymen and cases where their unity of fatherland is accidental. Thus if two Scots go together to Berwick⁹⁵ for a holiday, and there one seduces the other, it seems hardly just that on return to Scotland he should escape liability to her by reason of the scene of his actions⁹⁶; but

⁹¹ So Willes J., explaining why implied terms in a contract usually derive from the law of the place of contracting—*Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115, 123.

⁹² No. 251, quoted by Batiffol, *Droit International Privé*, p. 556, note (1).

⁹³ (1862) 1 H. & C. 219.

⁹⁴ (1873) L.R. 4 P.C. 439.

⁹⁵ Geographically in Scotland, as on the north bank of the Tweed, but governed by English law: it is the last relic of King Edward I's conquest of Scotland in the thirteenth century.

⁹⁶ By English law no action for seduction is available to the lady affected; while in Scotland such an action lies.

if he goes there on his own and meeting a woman seduces her, it seems hardly just that he should be liable in Scotland by the accident of her being a fellow-Scot. In the first case they are each other's environment, but in the second the locality—or rather the community of the locality—must be included, for it was as members, however temporary, of that community that they came together. It may be objected that this opens the door to many fine distinctions; but fine distinctions are as necessary to justice as are hard and fast rules to jurisdiction, and abstract writers have done the law no service by attempting to impose upon it a single rule of thumb.

It is because the environment of an alleged wrong is the community against which as a background it was committed that the law of Quebec is irrelevant to wrongs committed in a purely American camp, though territorially in the Province of Quebec; that English law must govern a wrong committed in a purely English charabanc, even when in France; and that Czech law, it is submitted, must govern a defamatory report by one Czech on another to the Czech Government, even if made in England. In the case in which that point arose⁹⁷ *Henn Collins J.* so decided; and when *Somervell L.J.* overruled him he did so without argument (for the defendant's counsel had disclaimed that ground for the decision in his favour), and also *obiter*: by Czech law the defendant would have had an absolute privilege, and by English law only qualified privilege; but as he was held to have acted honestly it made no difference which privilege he had.

Cases where the environment is confined to visitors, however, are naturally enough exceptional. The environment, even the moral environment, will almost always include the local community, and the rule of thumb will then produce the right answer.

If the defendant escapes by showing that he modelled his conduct on the law of his environment, can the same be said where the harm is negligently caused, the defendant not having consciously modelled his conduct on anything at all? The answer lies in the nature of negligence, namely the failure to take care: the defendant need not take more care than the law of the environment demands merely because he may find himself tried elsewhere. So with vicarious liability: the reasonable man, who is the yardstick, would naturally assume himself to be liable according to the law of the environment into which he sends his servant to act for him.⁹⁸

There remains another question raised in *Mackinnon's case*,⁹⁹ where the defendant was admittedly liable for special damages, but not (it was pleaded) for general damages: even if these are to be taken (as they were) to be two separate causes of action they sprang

⁹⁷ *Szalatna-Stack v. Fink* [1947] K.B. 1.

⁹⁸ *The Stokesley Steamship Co. c. Compagnie Transatlantique* (France, 1905: Req.) [1908] Dalloz, i. 137.

⁹⁹ 1955 S.L.T. 49.

from the identical want of care owed to the identical person. So also if by the local law it were a tort to break a man's arm but none to kill him—and not merely that the dead man's right of action died with him, which is more a question of succession than of tort—it seems a little out of place to allow the defendant to say that, modelling his degree of care upon the local standards, he had intentionally driven his car as fast as possible so that if he did collide with a pedestrian he could be sure of a fatal result. It is possible, however, that even here the invocation of the law of the environment can be justified, if on a slightly different ground, namely that the defendant must not be taken by surprise in being subjected to standards which, even if he had thought about it, would not have presented themselves to his mind. Such a ground might make the wrongdoer's flag relevant to torts between ships on the high seas, which has indeed been held in France,¹ Scotland,² and America³; but which has been contradicted in England.⁴ It is possible, however, to reconcile the English decisions with the principle suggested above by saying that navigators on the high seas ought to have in mind the old common rule of the sea as well as their national law: where the controversy, though maritime, has nothing to do with maritime law—for example when compensation is claimed for death on the high sea—there has been a suggestion even in England that the law of the defendant's flag might be an excuse.⁵

It may be objected to this explanation that it is easy enough to talk about people modelling their conduct or their standard of care upon one law or another, but in fact men do no such thing. Far from modelling anything on law they are largely ignorant even of their own law, let alone foreign law. This is true, and it is most emphatically true that no armchair mythology deserves to be called an explanation. It must therefore be admitted that all talk of modelling is misleading; and we must return for accurate language to the analogy of Rome. It is not that a visitor to Rome learns

¹ *Wilson Sons & Co. c. Tandonnet Freres* (1891: Civ.) [1892] Dalloz, i. 401. This was a question of limitation of liability: the English wrongdoer offered to abandon ship and freight, as he could by French law. It was held in 1887 by the Commercial Court (upheld by the Court of Appeal at Rennes) that this part of French law was inapplicable to foreigners on the high seas ([1889] Dalloz, ii. 145—so also *Hunting & Sons c. Jauffret* (1889: C.A. Aix.), 28 Clunet 104; and the consequence was liability in full unless the English limitation of £8 a ton applied, as all three courts held it did.

² *Kendrick v. Burnett* (1897) 25 R. 82, approving the article of the 1885 Antwerp Congress according to which there must be liability by the law of both flags—a suggestion of the environmental approach. The question was whether an English vessel was liable to pay *solatium* in respect of fatal casualties on the other ship.

³ *La Bourgogne* (1907) 210 U.S. 95; *The James McGee* (1924) 300 Fed. 93—both cases of liability for fatal accidents.

⁴ *The Leon* (1881) 6 P.D. 148; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q.B.D. 521—both cases on the extent of vicarious liability.

⁵ *Per Kennedy J. in Davidsson v. Hill* [1901] 2 K.B. 606.

Roman manners in advance: it is that he will admit himself to be in the wrong if he is caught in breach of them. It is not that a foreigner knows the laws of his host-country: it is that the law of that country is the law by which he expects to be caught, whether because he fears to be haled before a tribunal there applying only its own law, or (less probably) because he feels a guest should behave himself. It must be emphasised that this is a matter of fact: if that is what an ordinary reasonable man feels, then the relevant foreign law is a good excuse; and if it is not then no concord of legal experts will make it so. It is submitted that this is what the reasonable man feels when he is abroad, subject to the occasional exceptions already noticed.

J. A. CLARENCE SMITH.*

* Attorney-General of Eritrea.

PROPERTY IN THE LAW OF FALSE PRETENCES

THE difference between larceny by a trick and obtaining goods by false pretences is axiomatic in English criminal law. From the eighteenth century to the present day it has been laid down that everything depends upon whether the owner of goods, as a result of some deception on the part of the defendant, intended to pass the property in them to the defendant or merely possession of them. The historical foundations of this "subtle distinction"¹ are two-fold. In the first place, the common law rule that larceny required lack of consent meant, or was interpreted to mean by eighteenth-century judges anxious to counteract the effects of capital punishment upon the minds of the jury,² that consent by the owner to the transfer of ownership nullified a charge of taking a thing *invito domino*. Consent to a transfer of ownership, even though it was obtained by fraud, was none the less consent for the purposes of the law of larceny. Secondly, one of the earliest statutes which dealt with obtaining by false pretences, the Larceny Act, 1827³ (which was incorporated in later statutes dealing with the same problem⁴) was construed as maintaining the old common law distinction between larceny and false pretences, although at the same time it provided a remedy for the failure of justice which that distinction frequently produced. In the leading case of *R. v. Kilham*⁵ a strong court decided that, notwithstanding the change in the law, there was still a difference between the two offences, and such difference was based upon the distinction between obtaining possession and obtaining property. For that reason a man who obtained the temporary use of a horse by means of a false pretence could not be guilty of larceny, since he had not obtained possession with the intent of permanently depriving the owner of the horse; nor could he be guilty of obtaining by false pretences, since all he had got was possession and not property in the horse. What was looked at by the court was the immediate and actual benefit obtained by the defendant. If the "benefit" obtained by the prisoner was the kind of benefit normally conferred by ownership, false pretences

¹ See Larceny Act, 1827 (7 & 8 Geo. 4, c. 29), s. 53.

² Hall, *Theft Law and Society*, Chap. 2.

³ 7 & 8 Geo. 4, c. 29, s. 53, re-enacting 30 Geo. 2, c. 24, s. 1, which had been repealed by 7 & 8 Geo. 4, c. 27.

⁴ See now Larceny Act, 1916 (5 & 6 Geo. 5, c. 50), s. 32.

⁵ (1870) L.R. 1 C.C.R. 261, Bovill C.J., Willes, Byles, Hannen JJ., and Cleasby B. See also *R. v. Prince* (1868) L.R. 1 C.C.R. 150. For earlier cases in which the importance of the distinction had been maintained before the Larceny Act, 1827, see *R. v. Adams* (1812) Russ. & Ry. 225; *R. v. Jackson* (1826) 1 Mood. 119; *R. v. Longstreeth* (1826) 1 Mood. 136.

had been committed. If the only benefit obtained was the kind which resulted from possession then there was no offence.⁶

Later cases, both criminal⁷ and civil,⁸ emphasised the importance and effect of this distinction in both criminal and civil law. Though some of those effects have been modified by statutory changes providing for conviction even if the facts as proved do not substantiate the charged contained in the indictment (as long as they substantiate guilt of larceny or false pretences) the basis for the distinction still survives and can be important. For since the crime of obtaining by false pretences depends upon the obtaining of "property" and nothing else, if the facts do not show that *property* in the goods was obtained by the *defendant*, even though he may have obtained physical possession of them, the offence of false pretences has not been committed.⁹

However, two recent cases in New Zealand and Canada raise a problem that has not yet come before the English courts, and show that, for various reasons, the strictness of the common law distinction may have to be modified in England as it has been elsewhere.

In *R. v. Miller*¹⁰ the New Zealand Court of Appeal was faced with the following facts: The defendant had contracted to purchase a truck under a hire-purchase agreement by which he agreed to hold the vehicle "during the hiring solely as . . . bailee" of the vendor company; and, until the option of purchase was exercised by paying the balance of the purchase price, he agreed that he would not "have property or interest as purchaser" in the vehicle. The cheque which the defendant gave the vendor company by way of part payment of the purchase price was for a greater sum than to the defendant's knowledge was in his bank account at the time he made the agreement. He was charged and convicted of obtaining by false pretences, and appealed to the Supreme Court. The point was therefore squarely put before that court whether a charge of false pretences could be sustained by proof that the defendant had not obtained ownership of the goods in question.

⁶ *Cf. R. v. Gabriel Sans Garrett* (1853) 1 Dears. 232. In *R. v. Boulton* (1849) 1 Den. 508 the prisoner was held guilty of false pretences when what he had obtained was a ticket which entitled him to a ride on the railway, but which he had to surrender on completion of the journey. In *R. v. Kilham* this was approved because the prisoner had entirely converted the ticket to his own use for the only purpose for which it was capable of being applied. *Cf. the* similar case of *R. v. Chapman* (1910) 4 C.A.R. 276. The idea of obtaining a benefit was also the basis of the decision of the Supreme Court of New South Wales in *R. v. Doyle* (1881) 2 N.S.W.L.R. 197 where D., by a false pretence, got a ticket from X who had to pay its price to Y. Held, D. had obtained money from X: he had got the benefit of it.

⁷ *R. v. Buckmaster* (1888) 20 Q.B.D. 182; *R. v. Russett* [1892] 2 Q.B. 312.

⁸ *Oppenheimer v. Frazer* [1907] 2 K.B. 50; *Whitehorn Bros. v. Davison* [1911] 1 K.B. 463; *Folkes v. King* [1923] 1 K.B. 282; *London Jewellers, Ltd. v. Attenborough* [1934] 2 K.B. 206; *Pearson v. Rose & Young* [1951] 1 K.B. 275.

⁹ *R. v. Smith* (1950) 34 Cr.App.R. 168; *R. v. Ball* (1951) 35 Cr.App.R. 24; *R. v. Lurie* (1951) 35 Cr.App.R. 113.

¹⁰ (1955) N.Z.L.R. 1038.

In deciding that such a charge could validly be preferred against the defendant, who was consequently correctly convicted of the crime, the court began by discussing the history of the crime in England and the interpretation placed upon the relevant statutes by English courts. Then the court noted that New Zealand courts had not followed the English authorities, but had accepted that in the appropriate New Zealand legislation (which was similar to the English) the word "obtains" means "obtaining possession irrespective of any question whether any title to the goods is obtained at the same time."¹¹ Both the New Zealand cases referred to, *R. v. Cox*¹² and *R. v. McReynolds*¹³ (which simply followed the former case without adding anything to the discussion), accept, on grounds of ordinary colloquial meaning and on strict statutory interpretation, the wider meaning of the word "obtains." Salmond J., in the earlier case, thought that the terms of the legislation seemed "wide enough to cover not only those cases of fraud which do not amount to larceny but also those cases which do,"¹⁴ with which may be contrasted the opinion of the Court of Criminal Appeal in *R. v. Ball*¹⁵ to the effect that the "obtaining must not be in such circumstances as amount to larceny." Furthermore, the New Zealand judges seem to have approached the question on the footing that the English interpretation was too narrow and relied too much upon the immediate purpose of the statute.¹⁶ Salmond J. in *R. v. Cox*¹⁷ took a broader view and looked at the word "obtains" as it was used in other parts of the criminal law, where it undoubtedly did have reference to mere possession.

The court in *R. v. Miller* followed these earlier views, and thought that there was no reason in principle why a person should not be convicted of obtaining by false pretences where he secured physical possession of the goods though not their ownership, even though the same act might constitute theft by fraud and obtaining by false pretences.

In the course of the court's judgment reference was made to an early (1883) Australian case, *R. v. Arnold*.¹⁸ There the Supreme Court of New South Wales held that a man who, having bought cattle from X, got them delivered to him by X's agent, was guilty of obtaining by false pretences, even though it had been argued that, having obtained ownership of the goods by the contract of sale, he could not be said to have obtained anything by his false pretence except possession, without the consent of the former owner.

¹¹ *Ibid.*, at p. 1045.

¹² (1923) N.Z.L.R. 596.

¹³ (1935) N.Z.L.R. 944.

¹⁴ (1923) N.Z.L.R., at p. 606.

¹⁵ (1951) 35 Cr.App.R. 24, at p. 27.

¹⁶ *R. v. Cox* (1923) N.Z.L.R. 596, at p. 600, *per* Hosking J.

¹⁷ *Ibid.*, at p. 606.

¹⁸ (1883) 4 N.S.W.L.R. 347. *Cf. R. v. Doyle* (1881) 2 N.S.W.L.R. 197 the facts of which are summarised in note 6, *supra*.

Martin C.J., in that case,¹⁹ said of the defendant: "he did obtain 'the property' in the sense in which the legislature used the word; he obtained the bodily possession of the cattle." Innes J. said²⁰: "The word 'property' . . . means the chattel itself and not the ownership of it."

Another reference of the New Zealand court was to Canada, of which country it was said that it followed the English view on this subject.²¹ But to the present writer the recent decision of the Supreme Court of Canada in *R. v. Hemingway*²² and the cases referred to therein shows that this opinion is not strictly accurate.

In that case the defendant had entered into a conditional sales contract for the purchase of some furniture. As a result of certain fraudulent representations he made he was enabled to take possession of the goods in question. After a number of instalments had been paid a further fraud on the part of the defendant led to the true story coming out into the open, whereupon the defendant was charged with and convicted of obtaining the furniture by false pretences. That conviction was quashed in the British Columbia Court of Appeal, from which decision the Crown appealed to the Supreme Court of Canada. There it was held by all the judges that the defendant was rightly convicted. But two different *rationes decidendi* appear from the judgments given.

Kellock J. (with whom Locke J. concurred) took the view that in the language of Lord Coleridge in *R. v. Russett*²³ there is a difference between a sale (or other transaction passing property) which is complete and one which is not. Where the transaction is incomplete the only possible offence is larceny; where it is complete then false pretences is the right charge. In the circumstances of the *Hemingway* case, according to Kellock J., there was a complete transaction because under the conditional sale agreement (which apparently is a type of agreement differing from the English form of hire-purchase²⁴), the original owners of the furniture were consenting not only to the transfer of possession but also to the

¹⁹ (1883) 4 N.S.W.L.R., at p. 352.

²⁰ *Ibid.*, at p. 354.

²¹ Reference was made to *R. v. Scheer* [1923] 2 D.L.R. 402. But that case, as was pointed out in *R. v. Hemingway*, turned upon the necessity for showing that the prisoner had obtained "some" property right and not merely possession of goods: [1923] 2 D.L.R., at p. 403, *per* Perdue C.J.M. See also *R. v. Nowe* (1904) 8 Can.C.C. 441; *R. v. McManus* [1924] 3 D.L.R. 297 in which there was no intention to pass any property whatever and therefore it was held that false pretences were not committed. Contrast *R. v. Craingly* [1931] 3 D.L.R. 640 and *R. v. Kinsey* (1948) 91 Can.C.C. 347 in which the prisoner obtained more than mere physical possession. He also fraudulently induced someone to part with "some" kind of property interest in the goods in question, *e.g.*, his interest as bailee of a parcel of trousers in *Craingly*, and an interest as a purchaser on terms of a truck in *Kinsey*. This is the very point that was finally settled by the Supreme Court of Canada in *R. v. Hemingway*.

²² [1956] 1 D.L.R. 2d 34.

²³ [1892] 2 Q.B. 312, at p. 314.

²⁴ *Per* Estey J. [1956] 1 D.L.R. 2d, at p. 43.

transfer of the property in the goods, subject only to the terms of the agreement. By those terms, it should be pointed out, the purchaser was recognised as having some "interest" in the goods. But the vendor was recognised as having "title to, property in and ownership" of the goods, until all the purchase price had been paid. Although it could be argued that the vendors still retained property in the goods under the contract, and intended to retain property in the immediate future—which would seem to negative any inference that false pretences had been committed—Kellock J. considered the vendors had passed to the defendant an interest which would and was intended to ripen into ownership upon the occurrence of a certain contingency, namely, payment of the full purchase price. Therefore, the vendors had intended to pass ownership and the transaction was complete: which meant that false pretences had been committed.

In coming to this conclusion Kellock J. was influenced by, and quoted such English authorities as, *Whitehorn Brothers v. Davison*²⁵ and *Folkes v. King*²⁶ in which the scope of the two offences of larceny and false pretences was discussed. But in those cases, as in others²⁷ which were not referred to by Kellock J., the question for the court to determine related to the recovery in civil proceedings of goods which had been "acquired" (to use a neutral term) from one innocent party by a rogue and transferred by him to another innocent party. There was no issue of guilt of any crime before the courts. Anything said by the judges in those cases about the crimes in question was, of course, *obiter* (though of persuasive authority). Moreover, from those cases there appears a conflict of judicial opinion on the question whether in determining claims to property regard should be paid to the technical differences between the crimes of larceny by a trick and false pretences. Some judges²⁸ would appear to say that, where issues relating to the Factors Acts, and agents of one kind or another are raised, although in the criminal law larceny by a trick and false pretences both negative "consent" on the part of the owner, nevertheless possession of goods which is obtained by *either* crime amounts to possession obtained with the owner's "consent," so as to permit of the passing of a good title to an innocent third party. Others,²⁹ however, would appear to apply the strict criminal law rules in order to determine the issue of title to the goods in question. Whatever be the true principle to apply in civil cases, these authorities, it is

²⁵ [1911] 1 K.B. 463.

²⁶ [1923] 1 K.B. 282.

²⁷ *Oppenheimer v. Frazer* [1907] 2 K.B. 50; *London Jewellers, Ltd. v. Attenborough* [1934] 2 K.B. 206; *Pearson v. Rose & Young* [1951] 1 K.B. 275; *Du Jardin v. Beadman Bros.* [1952] 2 Q.B. 712.

²⁸ e.g., Bankes L.J., Scrutton L.J. in *Folkes v. King* (*supra*) at pp. 296–298, 305–307; Vaughan Williams L.J. in *Whitehorn Bros. v. Davison* (*supra*) at p. 473; Somervell L.J. in *Pearson v. Rose & Young* (*supra*) at pp. 284–286.

²⁹ e.g., Fletcher Moulton L.J. in *Oppenheimer v. Frazer* (*supra*) at pp. 71–73, Atkin L.J. in *Lake v. Simmons* [1926] 2 K.B. 51, at pp. 71–72.

submitted, are not very helpful in the criminal law, in that they are not concerned with the specific problem of the criminal law, namely, what has to be "obtained" for the crime of false pretences to be committed?

Moreover, it could be argued that whereas in these civil cases the original owner had given the rogue physical possession of goods with a power to dispose of them by sale to third parties, in criminal cases like *R. v. Hemingway* (and *R. v. Miller*) the owner had given physical possession only with a power to turn it into full ownership on the part of the rogue himself and nobody else. It is true that in *Whitehorn Bros. v. Davison*³⁰ the parties contemplated a sale to the rogue himself: but that was only in order to enable him to resell to a third person, as the original owner knew. The transaction was not designed to make the rogue more than a "conduit pipe" for the passing of title. Hence, in the civil cases there was something more than possession given to the rogue; there was possession plus a disposable interest (which the interest of the rogue in *Whitehorn Bros. v. Davison* could be considered). But in the criminal cases only possession was intended to pass, and any kind of disposable interest was either expressly (as in *R. v. Hemingway*) or impliedly (as in *R. v. Miller*) excluded by the contract between the parties from the powers and rights of the rogue. That being so, the arguments in the civil cases relating to situations in which a power of disposition of the property is given to the rogue do not apply to cases where no such power has been given. Admittedly in *London Jewellers, Ltd. v. Attenborough*³¹ Greer L.J. said that *Folkes v. King* was authority for the proposition that "where a man obtains possession with authority to sell or to become the owner himself, and then sells, he cannot be treated as having obtained the goods by larceny by a trick" (inferring that the appropriate charge is false pretences). But with all respect it is submitted that there is nothing in the judgments in *Folkes v. King* which will substantiate so wide a statement of its *ratio decidendi*. Moreover, even if opinions to that effect can be inferred from what was said in that case,³² they could be regarded as *obiter*, since the case was concerned only with a situation in which the owner intended the rogue to dispose of the goods to someone else other than himself. In *London Jewellers, Ltd. v. Attenborough* there was never any intention on the part of the original owners that the jewellery they delivered to the rogue "on appro" should eventually become his property; he was supposed to sell it to third parties. Consequently, it is submitted,

³⁰ [1911] 1 K.B. 463.

³¹ [1934] 2 K.B. 206, at p. 222: italics supplied.

³² e.g., Bankes L.J.'s statement [1923] 2 K.B. 282, at p. 293, that the facts in *Folkes v. King* were indistinguishable from those in *Whitehorn Bros. v. Davison*. But in that case it was contemplated that the rogue should *himself* become owner of the goods. In *Folkes v. King* it was contemplated that the rogue should pass ownership to someone else.

nothing in that case is really relevant to the issues now under discussion.

One further point may be noted here before considering the other judgment in *R. v. Hemingway*. Over twenty years ago Professor Hamson³³ drew attention to the undesirability of going to the criminal law for the purpose of solving problems and settling principles of the law of contract. A converse argument may well be put, in that it is unsatisfactory to go to cases on the law of contract to find the correct principles of the criminal law. It is accepted that distinctions in the criminal law are more often artificial and dictated by immediate policy than logical and resulting from well-thought out deduction. The law of theft is full of anomalies; and the proper way to rid the law of them is not by seeking to turn their flank but by appropriate legislation. There is some justification for abolishing the distinction between larceny and false pretences, and having a composite crime defined so as to include both. But while the distinction still exists it is difficult to justify constructions of the different offences so as to make them more like each other. In this respect it would seem that the English courts are also not free from criticism. For in some of the civil cases,³⁴ but apparently not the criminal ones, it has been said that a person can be guilty of obtaining by false pretences where what has been obtained is not property in the goods but the power to deal with or pass the property. This would appear to conflict with what has been said in such recent cases as *R. v. Lurie*³⁵ and *R. v. Ball*,³⁶ to the effect that only where property has been obtained can the crime of false pretences be committed.

In the *Hemingway* case the judgment of Estey J. (with whom Kerkin C.J. and Abbott J. concurred) is not so open to criticism as that of Kellock J. For the starting point of Estey J.'s judgment is that the relevant Canadian statutory provision differs from the English legislation. Whereas in England³⁷ the offence relates to the obtaining by a false pretence of "any chattel, money or valuable security," the Canadian section³⁸ speaks of obtaining "anything capable of being stolen." The result of this difference, which as Estey J. pointed out,³⁹ was deliberately made by the committee set up to draft a Canadian criminal code in the nineteenth century, is to make the scope of the Canadian section much wider than the English. An interesting point here is that the Canadian

³³ "The Effect of a Secret Fraudulent Intent" (1935) 51 L.Q.R. 653, at p. 660.

³⁴ e.g., *Pearson v. Rose & Young* [1951] 1 K.B. 275, at p. 288, *per* Denning L.J. Cf. Hamson, *op. cit.*, at p. 656.

³⁵ (1951) 35 Cr.App.R. 113.

³⁶ (1951) 35 Cr.App.R. 24.

³⁷ Larceny Act, 1916, s. 32.

³⁸ Canadian Criminal Code, 1927, s. 405 (1). The Criminal Code, 1953-1954, s. 304 (1) (a) now speaks of "anything in respect of which the offence of theft may be committed": but the variation of language does not affect the present issue.

³⁹ [1956] 1 D.L.R. 2d 34, at p. 44.

committee based much, if not all of their draft, upon the draft Criminal Code prepared for England by the Royal Commission of 1878-1879. Whereas the English code was rejected, the Canadian one became law; with the result that the problems of English law in respect of false pretences at least (to say nothing of other branches of the criminal law) did not arise in Canada.

By way of interpolation into the discussions of Estey J.'s judgment it can be noted that in one of the English cases⁴⁰ it was pointed out that, although one can steal a thing, one cannot steal a power to deal with a thing; but one can obtain such a power by false pretences. Under the Canadian legislation this is not only expressly enacted, but even extended in scope; for it is possible under that legislation to obtain by false pretences not merely the property in a chattel but also any kind of property interest in it, including what one may call for present purposes a "contingent" interest which will eventually vest in oneself. Hence a contract which reserved full title in the vendor of the furniture but contemplated the eventual transfer of title to the purchaser as a result of his payment of the purchase price, thereby disposing of the furniture to himself, even though he could not dispose of it to anyone else, can be said to pass not merely possession of the thing to the purchaser, but also a property interest.

This was in fact the approach of Estey J., who held that, since a property interest, as just defined, could be obtained by false pretences within the meaning of the legislation, the defendant was properly convicted. Such a conclusion was in fact justified by earlier Canadian authorities.⁴¹ This reasoning by Estey J. has much to commend it, particularly when it is compared with the reasoning of Kellock J. The latter purported to extend English cases dealing with the obtaining fraudulently of a power to dispose of goods to third parties to cover a situation in which the rogue only had power to dispose of the goods to himself. This as seen above is questionable. Estey J., however, by keeping close to the words of the Canadian statute, was able to avoid the necessity for extending the English cases beyond what they would appear to justify. Indeed he did not refer to English cases except to distinguish them as being inapplicable. Moreover the cases to which he did refer were criminal ones, and not those mentioned above in which title to property was in question as opposed to the criminality of certain acts.

How far can these decisions and the reasoning behind them be expected to have any effect upon the law in England? To begin with, it is too late now for any court but the House of Lords to upset the idea that false pretences can only be committed where property is intended to be passed and not merely physical possession. But can "property" be interpreted by a court other than the House of Lords to mean any other interest in goods apart from

⁴⁰ *Whitehorn Bros. v. Davison* [1911] 1 K.B. 463, at p. 479, *per* Buckeley L.J.

⁴¹ Cited in note 21, *supra*.

ownership? The idea that false pretences can be committed where the defendant was getting possession plus the power to dispose of the property in the goods, as already noticed, seems to be one finding expression in civil cases and not criminal ones. Indeed in the article already cited⁴² Professor Hamson referred to "the unquestioned premise . . . that there is larceny by a trick if a bailment only is intended by the owner and an obtaining by false pretences if a sale is intended by the owner." This would seem to exclude the possibility of false pretences being the right offence where there is a bailment with the power to dispose of the property. If this is so then the arguments of Kellock J. can have no effect in England at all on courts below the House of Lords. Moreover on the test which seems to arise from *R. v. Boulton*⁴³ and *R. v. Kilham*,⁴⁴ and relates to the benefit to the defendant, it would seem that in cases of hire purchase the defendant gets the benefit of *possession* not ownership, which would exclude false pretences. But if the point ever does come before the House of Lords for decision it would be open for their Lordships to sweep the distinction away entirely, as the New Zealand courts have done, or to maintain the distinction but extend the scope of false pretences in the way suggested by Kellock J. In the absence of any judicial change the only possibility is statutory alteration of the law, in which event the Canadian legislation, which makes possible a judgment like that of Estey J. is desirable, unless, which is probably even more desirable, the differentiation between these two offences is abolished altogether.

G. H. L. FRIDMAN.*

⁴² 51 L.Q.R. 653, at p. 660.

⁴³ (1849) 1 Den. 508.

⁴⁴ (1870) L.R.L.C.C.R. 261. And *R. v. Doyle* (1881) 2 N.S.W.L.R. 197; see note 6, *supra*.

* Assistant Lecturer in Laws, University College, London.

ADOPTION APPLICATIONS AND PARENTAL RESPONSIBILITY

IMPLEMENTATION of the recommendations contained in the Report of the Departmental Committee on the Adoption of Children¹ presented to Parliament in September, 1954, is still awaited. The delayed announcement by the Government that it intended to legislate—it finally came in March, 1956²—had already exacerbated those directly concerned with the problems of child welfare. This feeling was expressed in a joint letter to the Editor of *The Times* on January 30, 1956, from the Committee's Chairman (Sir Gerald Hurst, Q.C.) and the Chairman of the Standing Committee for the Societies for Adoption (The Hon. Mrs. G. R. Edwards).³

In the course of the letter, enumerating various lacunae and defects in the present law, the correspondents alluded to the clause in the Adoption Act, 1950, which allows the consent of the natural parent or guardian⁴ to be dispensed with if, *inter alia*, it is unreasonably withheld.⁵ They stated that the clause "has become a dead letter and there is now no way in which these children [*i.e.*, prospective adoptees] can be protected from frivolous or vindictive withdrawals unless a new ground for dispensation is enacted." This view, which is in terms more critical than the Committee's Report⁶—in part no doubt influenced by decisions subsequent to the Committee's deliberations—is not an unnatural reaction to the interpretations placed upon the section by the courts. Although the expression "dead letter" may be inapposite to describe the present frustration of adoption applications, the emphasis on parental rights in testing whether consent to adoption is "unreasonably withheld" has unduly circumscribed the powers of the courts, in particular the courts of summary jurisdiction.

The present article attempts to investigate the extent to which adoption applications are likely to be thwarted by the capriciousness of a natural parent and whether the clause at present operates in a socially desirable manner. In evaluating the present

¹ Cmd. 9248.

² *The Times*, March 7, 1956. During the debate on Child Welfare the Government reiterated its intention to legislate as soon as time could be found: H.C. Debate, July 2, 1956, Vol. 555, cols. 1004, 1057 and 1106. In answer to Mrs. Barbara Castle, M.P., the Home Secretary stated the Government could give no undertaking to bring in legislation in the present Session: H.C., February 28, 1957, Vol. 565, cols. 1393-1394.

³ The Hon. Mrs. G. R. Edwards was also a member of the Committee.

⁴ Since the guardian's consent may not involve a consideration of the blood tie the present article does not deal with guardians. Indeed, all the reported cases deal with the consents of a natural parent.

⁵ s. 3 (1) (c). For a brief discussion on the problem of consents, see *A Century of Family Law*, Chap. 3 (II) by T. E. James, pp. 45 and 50 *et seq.*

⁶ Paras. 113-122, pp. 29-32.

position, it is proposed to consider (a) the history of the legislation; (b) the legal interpretation of the present clause; (c) the experience of Commonwealth countries; (d) the cumulative effect of a new dispensation clause and an introduction of a pre-application probationary period; and (e) the possibilities towards a solution of the problem.

HISTORY⁷

The power to dispense with consents was provided for in section 2 (3) of the 1926 Act.⁸ The section (which appears now in substantially similar terms in section 2 (4) (a) of the 1950 Act) set out those persons whose consents were necessary as a prerequisite to the making of an adoption order. A proviso stated that the court might dispense with any consent if the person whose consent had to be sought had abandoned or deserted the infant,⁹ was incapable of giving consent or could not be found,^{9a} or was a person who being liable to contribute to the support of the infant has persistently neglected or failed to contribute to such support,¹⁰ "or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

⁷ The 1926 Act was a replica of the draft Bill presented as an addendum to the Tomlin Committee's Report (Cmds. 2401 and 2469). Some of the criticisms of the statutory introduction of adoption were indeed bizarre, at least to a reader in 1957: Dr. Jenks, "Recent Changes in Family Law," 44 L.Q.R. (1928) 314, at p. 319, writing of the 1926 legislation, said: "But it is one of the most painful conclusions which follow from a study of Acts of Parliament, and the cases arising out of them, that there appear to exist in the world a large number of persons who make a practice of perverting to their own infamous ends the beneficent intentions of legislators. And it is to be feared that such persons will find only too many opportunities in the Adoption Act for the exercise of their favourite pursuit." Dr. Jenks thought that there was a real risk of "unscrupulous persons gradually acquiring, by means of careful changes of locality, a considerable gang of children, over whom they have legal and irrevocable rights, and exploiting these children for sordid and infamous purposes. . . . What then is to prevent an energetic and peripatetic pair gradually collecting specimens of unfortunate childhood from all parts of the country?"

⁸ The phraseology of the section is retained in section 40 (2) of the 1950 Act, re-enacting s. 11 (3) of the 1939 Act, in relation to the requirement for the licensing authority to give its consent to a child being removed out of the jurisdiction for adoption abroad.

⁹ s. 3 (1) (a) of the 1950 Act is differently worded; it deals with the case of a child "abandoned, neglected or persistently ill-treated." The argument that there was a distinction between "abandonment" and "desertion" was rejected by Lord Goddard C.J. in *Watson v. Nikolaisen* [1955] 2 Q.B. 286, at pp. 296-297.

^{9a} *Re C. (an infant)*, The Times, April 2, 1957.

¹⁰ The wording in s. 3 (1) (b) of the 1950 Act, which in substance reproduces the 1926 provision, and the relevant part of s. 2 (4) (a) have been altered to read, "who is liable by virtue of any order or agreement to contribute to the maintenance of an infant." Since it has been held in *Re M. (an Infant)* [1955] 2 Q.B. 489 that a putative father is not a "parent" within the meaning of the word in s. 2 (4) (a), a putative father who voluntarily contributes to the child's maintenance should be included as being a person whose consent is to be sought, (1956) 19 M.L.R. 202. A similar situation persists in Scotland despite the contention that rights were given to the putative father which would make him a "parent," under the Illegitimate Children (Scotland) Act, 1930; *A. v. B.*, 1955 S.L.T. 436.

The proviso clearly gave the courts the widest possible discretion.¹¹ It directed the court to exercise its powers of dispensing with a natural parent's consent in appropriate cases without going quite as far as to provide, as in guardianship cases, that the welfare of the child is to be the "first and paramount" consideration.¹² In *H. v. H.*¹³ the appellant sought to contend that the final words of the proviso were limited to cover only the case of a person who had failed to contribute to the support of the infant. Lord Goddard C.J. said¹⁴: "I attach great importance to the words 'and in all the circumstances of the case.' The proviso seems to be intended to give the justices the widest possible discretion." Although the decision seemed unexceptionable, the Hurst Committee¹⁵ expressed surprise that the court could dispense with any consent under the proviso.

The Adoption of Children Act, 1949, which overhauled the existing law, reframed the provision dealing with consents, setting out (in what is now section 3 (1) of the 1950 Act) the cases where the consents required by virtue of section 2 (4) (a) could be dispensed with, viz., "in any¹⁶ case that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is¹⁷ unreasonably withheld."¹⁸

It was expected that this new provision would focus the attention of the courts on the welfare of the child when considering dispensing with any consent¹⁹; the new provision, on the other hand, clearly replaced the hitherto unbridled discretion by introducing a narrower and subordinate power.²⁰ In enacting the provision the legislature was making a clear distinction between the paramountcy principle as expressed in section 1 of the Guardianship

¹¹ *H. v. H.* [1947] K.B. 463 at p. 465-466 *sub nom.* *Harris v. Hawkins* [1947] 1 All E.R. 312, at p. 314. *Re A. B. (an infant)* [1950] V.L.R. 1; doubted in *The King v. M.* [1946] V.L.R. 106; disapproved of strongly by Sholl J. in *A. v. C.-S.* [1955] V.L.R. 340, at p. 362, which is in conformity with dicta in *Re Carroll* [1931] 1 K.B. 317, at p. 360-361, and *Re B.* [1939] V.L.R. 42. *Cf. S. v. S.*, 1956 (1) S.A. 66, a Southern Rhodesian case. See also Devlin J. in *Hitchcock v. W. B. & F. E. B.* [1952] 2 Q.B. 561, at p. 571, and Jenkins L.J. in *Re K. (an infant)* [1953] 1 Q.B. 117, at p. 126.

¹² Devlin J. in *Hitchcock v. W. B. & F. E. B.* [1952] 2 Q.B. 561, at p. 572, thought that the 1926 Act proviso enacted the paramountcy rule applicable in guardianship cases.

¹³ [1947] K.B. 463.

¹⁴ *Ibid.*, pp. 465-466.

¹⁵ Para. 114, p. 29.

¹⁶ My italics. Italics were, however, supplied in the text of the judgment of Jenkins L.J. in *Re K. (an infant)* [1953] 1 Q.B. 117, at p. 126.

¹⁷ Frequently the word "being" is interlineated. See, e.g., Lord Goddard C.J. in *Hitchcock v. W. B. & F. E. B.* [1952] 2 Q.B. 561, at pp. 570 and 571.

¹⁸ There appears to have been no discussion on the change of wording during the course of the Bill through Parliament. The wording is identical with an unused section of the Mental Deficiency Act, 1913, s. 6 (3) (a) as amended by s. 4 of the 1927 Act; see *R. v. Judge Radcliffe, ex p. Oxfordshire County Council* [1915] 3 K.B. 418.

¹⁹ Committee's Report, para. 117, pp. 29-30.

²⁰ See "The Adoption of Children Bill" (1949) 98 L.J. 605. *Cf.* a Scottish decision, *Y. Z.—Petitioners*, 1954 S.L.T.(Sh.Ct.) 98.

of Infants Act, 1925,²¹ and an integrated welfare principle for adoption. The compromise thus achieved would entail the employment of an objective test of the parent's behaviour towards the child.²² The parent's behaviour would not be tested without regard being paid to its effect on the child, and the proprietary interests of the parent would be considered on a parity with the parent's obligations to the child. The change in wording would seem therefore to have represented a shift of emphasis rather than a reversal in policy.

INTERPRETATION OF SECTION 3 (1) (c) OF THE 1950 ACT

Within a short time of the coming into operation of the 1949 Act, two cases within six months of each other in the Divisional Court and the Court of Appeal respectively decided in what instances consent might be dispensed with in the future by the inferior courts. These decisions marked the swing of the pendulum.

In the case before the Divisional Court, *Hitchcock v. W. B. & F. E. B.*²³ the test to be applied was clearly stated. The decision was further productive of some illuminating observations and expressions of doubt by Devlin J. The Court of Appeal, in *Re Adoption Act, 1950; Re K. (an Infant)*²⁴ affirmed the Divisional Court's test; and Jenkins L.J. made some observations on the comparable provision in the 1926 Act and the case of *H. v. H.* decided under that section. Of the judges hearing the *Hitchcock* case only Devlin J. alluded to the provision in the 1926 Act and then without reference specifically to *H. v. H.*, although Lord Goddard C.J. himself had given judgment in that case in the Divisional Court some five years earlier.

In the *Hitchcock* case²⁵ on the facts as found by the justices none of the specific grounds for dispensation was applicable. In determining that consent had been unreasonably withheld the justices did not state their reasons but appeared to apply the welfare test laid down in section 1 of the Guardianship of Infants Act, 1925, a test which the Lord Chief Justice rejected as overlooking the effect of adoption, "which is to extinguish wholly once and for all the parents' relationship to the child except that of blood relationship."²⁶

²¹ Even the welfare clause embodied in the Act is limited to contests between parent and parent or their respective relations, see (1955) 18 M.L.R. 490.

²² (1953) 16 M.L.R. 225.

²³ [1952] 2 Q.B. 561.

²⁴ [1953] 1 Q.B. 117.

²⁵ The facts of both the *Hitchcock* and *Re K.* cases have been set out in a contemporary note of the cases, (1953) 16 M.L.R. 225, by the present writer.

²⁶ [1952] 2 Q.B. 561, at p. 569. See similarly, Jenkins L.J. in *Re K.*, at p. 128, commenting on the judgment of the county court judge. There are numerous references in adoption cases to the distinction to be made between adoption applications and custody orders, *L. v. M.* (1956) 120 J.P. 27; *Z. v. Z.*, 1954 S.L.T.(Sh.Ct.) 47, at p. 48, *sub nom. Mr. & Mrs. C. D.*, *Petitioners*, *E. Respondent* (1954) 70 Sh.Ct.Rep. 169; *Re Murray* (1955) 55 S.R.

Counsel for the respondent adopters did not in fact contend that the welfare principle should apply but relied on an interpretation of the particular facts of the case demonstrating that the husband was unfit to continue as a father and that his withholding of consent was thus capricious. The court clearly did not think that the welfare principle could apply. Lord Goddard C.J. said ²⁷: "But the mere fact that the adoption order will be for the benefit of the child does not answer the question whether consent is being ¹⁷ unreasonably withheld." The tenor of this judgment, emphasising as it does the total deprivation of the rights of the natural parents, precludes the court from having regard to the obvious benefits that an adoption order may confer upon the child. The legislature can hardly have intended the sacrifice of the well-being of the child in favour of safeguarding the proprietary interests of the parents.²⁸ It is axiomatic that due regard must be paid to blood relationship. Equally, however, a parent is under a corresponding obligation to the child. The natural expectations of one who has cared for the child during a probationary period with a view to adoption should also be considered, as well as the disruptive effect upon the child, whose affection for the adoptive parents will have grown.²⁹

The test to be applied was succinctly stated by Devlin J.³⁰: "Is consent being ¹⁷ refused whimsically or arbitrarily, or not in good faith? Because if so *a fortiori* it would be unreasonable." Whilst noting the change in wording between the 1926 and 1950 Acts³¹ and without dilating upon the reasons for such change,³² Devlin J. concluded that it was "plain that the test is no longer the welfare of the child."³³

In *Re K.*³⁴ the Court of Appeal reversed the decision of the county court judge³⁵ and affirmed the Divisional Court's decision

(N.S.W.) 88, at pp. 95 and 96, *per* Street C.J. In *Watson v. Nikolaisen* [1955] 2 Q.B. 286, at p. 296, Lord Goddard C.J. appears to consider that the paramountcy of the child's welfare applies in *all* custody cases. *Cf.* Jenkins L.J. in *Re K.*, at p. 128; see (1955) 18 M.L.R. 490.

²⁷ *Ibid.*, p. 570.

²⁸ *Cf.* remarks of the Divisional Court in a case under s. 1 of the Children Act, 1948, *Re A. B. (an infant)* [1954] 2 Q.B. 385.

²⁹ This was a factor that was recognised by Harman J. in *Re F., an infant* [1957] 1 All E.R. 819.

³⁰ At p. 572. There is some indication in the judgment of Devlin J. that the court will pay regard to the discharge of a parent's obligations. Any such view was clearly repudiated by Lord Goddard C.J. in *W. and another v. D. and another* (1956) 54 L.G.R. 80, at p. 83; (1956) 120 J.P. 119, at p. 122.

³¹ Devlin J. noted the absolute discretion which prevailed in the 1926 legislation and came to the conclusion that under a section so worded "the justices would no doubt be right in regarding as the matter of paramount importance the welfare of the child" (p. 571).

³² But see p. 572.

³³ Whilst it may be doubted whether even under the 1926 Act provision the paramountcy of the child's welfare was the test to be applied, the passage is strikingly at variance with the subsequent view expressed by Jenkins L.J. in *Re K.* [1953] 1 Q.B. 117, at p. 126.

³⁴ [1953] 1 Q.B. 117.

³⁵ This order was an interim order for three months under the powers granted in s. 6 (1) whereby the court postpones the determination of the application

in the *Hitchcock* case.³⁶ "Prima facie," said Jenkins L.J.,³⁷ "it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship" and later³⁸ "... the withholding of a parent's consent to an adoption cannot be held unreasonable merely because the order would conduce to the welfare of the child." This presumption in favour of the reasonableness of any withholding,³⁹ a presumption concurred in by Devlin J. in the *Hitchcock* case,⁴⁰ has had the effect of wresting from the courts the power to determine the problem objectively; the court looks solely to the proprietary interest of the parent.

The existence of a presumption of the reasonableness of withholding consent would appear to involve applicants for adoption in the necessity of cross-examining both the natural parent who is refusing to give consent and the guardian *ad litem*—such cross-examination being directed to the report⁴¹ concerning the well-being of the child *vis-à-vis* its natural parents. The procedure on the application, which is normally held *in camera*,⁴² is inappropriate

and can make an order for custody for a probationary period not exceeding two years. An interim order is deemed not to be an adoption order within the meaning of the Act (s. 6 (4)). Presumably if it is a postponement of the hearing a consent already given can be withdrawn before the end of the probationary period.

³⁶ The decision in the *Hitchcock* case was given only two days before the hearing of the application in the county court (p. 133).

³⁷ At p. 129.

³⁸ At p. 130.

³⁹ Jenkins L.J. does not appear to contend for a presumption in the case of withdrawal but only in the initial refusal. Is this according some effect to an initial consent which it is sought to revoke for the purposes of deciding whether to dispense with such consent?; or is it merely conforming to the view that a withdrawal must be regarded as a consent never given as Street C.J. thought, in *Mace v. Murray* (1955) 55 S.R.(N.S.W.) 88, at pp. 97 and 99?; *Re Greenwood, Storvald and Storvald v. Black* [1956] 4 D.L.R. 711.

A consent initially given but later withdrawn is, moreover, not abandonment—and hence not desertion—within the meaning of those words in s. 3 (1) (a) of the 1950 Act; *Watson v. Nikolaisen* [1955] Q.B. 286, at pp. 294-295. If it were otherwise the decision in *Re Hollyman* [1945] 1 All E.R. 290 followed by Harman J. in *Re F. (an Infant)* [1957] 1 All E.R. 819, would be nullified and the vital moment of testing the giving of consent would be the time of the initial consent. A consent to adoption given on an unsuccessful application may be withdrawn before appeal, *F. & F. v. C. Association, The Times*, June 25, 1955. By leave obtained on *ex parte* motion in the Court of Appeal any person might appeal if he or she could possibly have been made a party to the application by service, *Re B. (an infant), The Times*, July 27, 1957.

⁴⁰ At p. 573.

⁴¹ The guardian *ad litem*'s report is not available to the parents, rules 10 and 11 of the Adoption of Children (High Court) Rules, 1950; rules 7 and 8 of the Adoption of Children (County Court) Rules, 1952.

⁴² Rule 14 of the Adoption of Children (County Court) Rules, 1952, gives effect to s. 8 (3) of the Act which provides that the Rules made by the Lord Chancellor by virtue of his powers under s. 8 (2) may in turn provide for application for adoption orders being heard and determined otherwise than in open court. In the High Court the practice and procedure of the Chancery Division is expressly preserved and such applications are invariably heard *in camera*, rule 30, The Adoption of Children (High Court) Rules, 1950. The procedure in Courts of Summary Jurisdiction is variable, see "The Hearing of Adoption Applications" (1955) 119 J.P.J. 778.

to the method of rebutting presumptions employed in ordinary litigation. If the presumption operates, then cross-examination will become a feature of adoption applications. One would have thought that courts could be trusted to deal with the problem of consents upon the documentary evidence before them without resorting to a method wholly alien to the proceedings concerned.⁴³

The sequel to the decision in *Re K.* has illustrated the effect of the interpretation placed upon section 3 (1) (c) which is stultifying the ultimate goal of adoption law, that is, to provide as normal an upbringing for a child as nature will allow.⁴⁴ The child concerned in *Re K.* was returned to the applicant foster parents⁴⁵ shortly after the appeal and will presumably remain there during his infancy—at least most of his formative years—without the benefits that adoption could give him by an order giving legal effect to what is in fact already socially true, *i.e.*, he has become the child of his new family. It is the risk of uncertainty and of a constantly shifting home background that the legislature hoped to avoid by providing a general clause for dispensing with consent. The restrictive interpretation placed upon “unreasonably withheld” would appear effectively to have deprived the courts of the ability to achieve these desirable results.

Post-1952 cases have done little to dispel the impression that only in rare instances will the courts be able to dispense with consents which are alleged to have been “unreasonably withheld.” The argument of the applicants in *Watson v. Nikolaisen*,⁴⁶ that the consent ought to be dispensed with under section 3 (1) (a) on the grounds that the child had been abandoned, indicated the view of the applicants’ advisers that, since no initial consent had been given, it was well-nigh impossible to establish that consent at the hearing was unreasonably withheld.⁴⁷ Behaviour falling short of abandonment, desertion or neglect might have been expected to fall within the “unreasonably withholding” provision; but the residual nature of the provision has been whittled away by the predominance of the proprietary interests of the non-consenting parent.

⁴³ The problem is considered more fully in the text below.

⁴⁴ In “Psychological Aspects of the Adoption Process,” 40 *Iowa Law Review* (1955) 350 the co-authors comment (at p. 354): “. . . it is fair to say that biological parenthood is of less importance to the maturing child than psychological parenthood. As far as the child is concerned, he need not essentially care who loves him as long as someone does” and later: “there is no *a priori* reason why a child should love and respect biological parents more than anyone else.”

⁴⁵ *Manchester Guardian*, April 17, 1953; the move took place only four months after the natural mother’s successful appeal.

⁴⁶ [1955] 2 Q.B. 286.

⁴⁷ As a subsidiary ground of appeal, it was argued that the consent was unreasonably withheld. The fact that counsel for the respondent was not called on to argue the point (p. 291) demonstrates the little reliance placed upon it.

Two cases before the Divisional Court in 1955,⁴⁸ whilst specifically following the test laid down in the *Hitchcock* and *Re K.* cases, indicated the narrow limits within which the clause for dispensing with consent might successfully be employed. In *L. v. M.*⁴⁸ the vindictiveness exhibited by the father towards his divorced wife, who was applying jointly with her second husband to adopt her child of the first marriage, made it abundantly clear that the justices who had applied the correct test were entitled to dispense with his consent; the decision, moreover, could not be reversed on appeal on the question of the father's attitude being reasonable or not since there was ample evidence before the justices upon which they could dispense with consent. The father's opposition to the order was based solely on his desire to "score off" his ex-wife and not in any way to exercise his parental rights.⁴⁹ In *W. & Another v. D. & Another*⁴⁸ the mother, whose contention was supported by an Adoption society,⁵⁰ objected to an adoption order being made solely on the grounds that the birth to the applicants of a child of the same sex subsequent to the application but before the order was detrimental to the prospective adoptee. Since the mother was still desirous of the child being adopted, objecting only to the specific applicants on this one ground,⁵¹ the Divisional Court found no difficulty in confirming the justices' decision to dispense with consent.

Both these decisions can be rationalised on the grounds that in neither case did the non-consenting parent, who was seeking to appeal against dispensing with consent, exhibit any desire or intention to exercise parental rights. Possibly similar expressions

⁴⁸ *L. v. M.* (1956) 120 J.P. 27 and *W. & Another v. D. & Another* (1956) 54 L.G.R. 80; (1956) 120 J.P. 119. Cf. *Hawkins v. Addison* [1955] 3 D.L.R. 435.

⁴⁹ An order for custody in favour of one spouse to divorce proceedings does not mean that the other spouse has been permanently deprived of legal custody so as to extinguish his or her rights, *Re G. & D. (Infants)* [1954] S.A.S.R. 40.

⁵⁰ Any objection to the making of an order by an Adoption Society or guardian *ad litem* ought to be raised under s. 5 (1) (b) of the Act on the ground that any order will not be for the welfare of the child. Such objection should not be raised by way of supporting the mother's refusal to give consent, a matter with which it is not for the society or guardian *ad litem* to interfere.

⁵¹ s. 3 (3) of the 1950 Act provides that consent may be given subject to conditions with respect to the religious persuasion in which the infant is to be brought up; a consent so given which is subsequently withdrawn on the ground that the identity of the adopter is unknown is by virtue of the section deemed to be unreasonably withheld.

The disclosure of the identity of the applicants has presented a thorny problem. S. 4 (1) of the Act allows for the identity of applicants to be kept secret from the parent, a serial number being employed in its place. Cases where a consent form is signed in blank has raised some difficulties and conflicting dicta; see *Y. Z. Petitioners*, 1954 S.L.T. (Sh.Ct.) 98, *sub nom.* *Mr. & Mrs. F. Petitioners v. H. Respondent* (1954) 70 Sh.Ct.Rep. 343. Cf. Committee's Report, para. 98, p. 25 commenting incorrectly on *Re Carroll* [1931] 1 K.B. 317. Dicta in the latter case are mostly at variance with the Committee's views, see Slessor L.J. (p. 319) and Greer L.J. (p. 340), *contra* Scrutton L.J. (p. 329). See also the judgment of the Court of Session in *H. v. H. Petitioners*, 1945 S.C. 99.

or actions by the non-consenting parents in the *Hitchcock* and *Re K.* cases would have resulted in successful applications to dispense with consent. It is the thin line between overt abdication of parental rights and the superficial and purely ostensible claim to exercise such rights that has tended to befog the courts in dealing adequately with the problem. A bald claim to exercise these rights, no doubt bolstered and rationalised *a priori* on the basis of the blood tie, should not prevent the court from investigating both the genuineness of the desire or intention to exercise parental rights and ability to perform parental duties.

EXPERIENCE IN THE COMMONWEALTH

The statutes of the Commonwealth legislatures vary considerably in both content and form. In New Zealand, for example, the first of the Commonwealth countries of the Christian world⁵² to provide for legal adoption (as long ago as 1881⁵³), consents are dealt with in section 18 (1) of the Infants Act, 1908,⁵⁴ whereby if the magistrate is satisfied that any parent or guardian is for any reason unfit to have the custody or control of the child, and a notice of the application for an order has been given to the parent or guardian, he may if he thinks fit dispense with consent.⁵⁵ The New Zealand experience largely formed the basis of the Adoption Acts in New South Wales,⁵⁶ South Australia,⁵⁷ Western Australia⁵⁸ and Tasmania⁵⁹ whereas the States of Victoria⁶⁰ and Queensland⁶¹ followed the pattern of the English Act of 1926. On the other hand, the Canadian Provinces⁶² sought the framework of their

⁵² See, e.g., in the case of India, Sarkar, *Hindu Law of Adoption*; also *Krishnamurthi Ayyar v. Krishnamurthi Ayyar* (1927) 43 T.L.R. 363.

⁵³ The Adoption of Children Act, 1881. See Campbell, *Law of Adoption in New Zealand* (1952); D. Stanley Smith, "Adoption of Children in New Zealand," *Journal of Comparative Legislation*, Vol. 3 (1921) 165.

⁵⁴ The Act of 1881 was amended in 1885 and replaced by the Adoption of Children Act, 1895, which was consolidated as Part III of the Infants Act, 1908, now the principal Act. An infants Amendment Act, 1950, substituted new provisions, see Campbell, *op. cit.* 7 *et seq.* An Adoption Act of 1955 made drastic changes in the legal effects of adoption and introduced the making of interim orders only, see 32 N.Z.L.J. (1956) 17 and 34 *Canadian Bar Review* (1956) in 356.

A proviso was added to s. 18 (1) (e) of the 1908 Act by the Statutes Amendment Act, 1951, s. 15, giving specific grounds for dispensing with consent.

⁵⁵ *Re P. V. H. (an Infant)* (1945) 4 M.C.D. 260; there is no comparable provision to either s. 2 (3) of the English Act of 1926 or s. 3 (1) (c) of the English Act of 1950.

⁵⁶ Part XIX of the Child Welfare Act, 1939-1952.

⁵⁷ Adoption of Children Act, 1925-1943.

⁵⁸ Adoption of Children Act, 1896-1953.

⁵⁹ Adoption of Children Act, 1920, as amended in 1941, 1943 and 1952.

⁶⁰ Adoption of Children Act, 1928 as amended in 1936 and 1942.

⁶¹ Adoption of Children Act, 1935-1952.

⁶² Alberta: The Child Welfare Act, 1944.

British Columbia: Adoption Act, R.S.B.C. 1948 as amended in 1953 and 1956.

Manitoba: The Child Welfare Act, R.S.M., 1954.

New Brunswick: The Adoption Act, R.S.N.B., 1952.

legislation from that in the Commonwealth and the United States of America.⁶³ Whilst in all the Provinces⁶⁴ except Prince Edward Island⁶⁵ and Newfoundland⁶⁶ adoption was authorised by statutes prior to 1926, a few incorporated changes in subsequent amending legislation on the lines of the English enactment.⁶⁷

The most useful clause concerning the dispensing with consent for comparative purposes is that operative in New South Wales. This section⁶⁸ has particular relevancy since recently leave to appeal to the Privy Council⁶⁹ from a decision of the High Court of

Newfoundland: The Welfare of Children Act, R.S.N., 1952.

Northwest territories: Adoption Ordinance, 1948.

Nova Scotia: Adoption Act, R.S.N.S., 1954.

Ontario: Child Welfare Act, 1954.

Prince Edward Island: The Adoption Act, R.S.P.E.I., 1951.

Quebec: Adoption Act, R.S.Q., 1941.

Saskatchewan: The Child Welfare Act, R.S.S., 1953, as replaced in 1955.

Yukon territory: Adoption Ordinance, 1954.

For South Africa: see Union Act 21 of 1937, as amended by Act 30 of 1943, and Southern Rhodesia, Act 41 of 1949; *S. v. S.*, 1956 (1) S.A. 66.

- ⁶³ The first State to require a formal judicial proceeding was Massachusetts in 1851; see Quarles, "The Law of Adoption—A legal anomaly," 32 *Marquette Law Review* (1949) 237. Hitherto, adoption by deed had been practised and indeed in many States persisted for some years, "Moppets on the Market: The problem of unregulated Adoptions," 59 *Yale Law Journal* (1950) 715, at pp. 725 *et seq.* On the Adoption laws of the United States, see Brosnan, "Law of Adoption," 22 *Columbia Law Review* (1932) 332; Morton L. Leavy, "Law of adoption," New York, 1954; Maurice H. and Orpha A. Merrill, "Toward Uniformity in Adoption Law," 40 *Iowa Law Review* (1954) 229-328; the latter article forms part of a symposium on the Law of Adoption which includes a draft Uniform Adoption Act, pp. 329-335.

On the laws of the rest of the world, see Margaret Kornitzer, *Child Adoption in the Modern World*, 1952; Addis, "Some points of English and Foreign Adoption Laws," (1953) 2 *I.C.L.Q.* 387; "Child Adoption: Practices in Different Countries," *Times Educational Supplement*, November 21, 1952.

- ⁶⁴ First enactments in the Canadian Provinces were: Alberta, 1913; British Columbia, 1920; Manitoba, 1922; New Brunswick, 1890; Nova Scotia, 1896; Ontario 1921; Quebec, 1924; Saskatchewan, 1922.
- ⁶⁵ In *Re M.* [1944] 4 D.L.R. 258, at p. 259, *per* Campbell L.J., Acting V.-C., and in *Re Davis* (1944) 17 M.P.R. 305, at p. 306.
- ⁶⁶ The first enactment was in 1942, which was substantially identical with the English Act of 1926.

For recent changes in Adoption Law in Canada, see "Changes and Developments in Child Welfare Services in Canada, 1949-1953," Memorandum No. 7, September 1954, of Department of National Health and Welfare Research Division, p. 11.

- ⁶⁷ See particularly British Columbia, *Re G. et Ux. v. C. et Ux.* (1937) 2 W.W.R. 271, at pp. 276 and 283 and *Re Adoption of Midland* (1955) 14 W.W.R. 699; and Ontario. *Re Roumeliotes* [1939] 4 D.L.R. 265; *Re Fex* [1948] O.W.N. 497; *Re Baby Duffell* [1950] S.C.R. 737; *Re Le Sieur* [1951] 2 D.L.R. 775; *Re I. (an infant)* [1955] O.W.N. 721; *Re Maat and Maat* [1957] 7 D.L.R. (2d) 488, *sub nom.* *Maat v. Hepton* [1957] O.R. 64.
- ⁶⁸ s. 167 of the Child Welfare Act, 1939-1952.
- ⁶⁹ *Murray v. Mace and another* [1955] *The Times*, October 11, before the Lord Chancellor, Viscount Kilmuir, Lords Oaksey, Morton of Henryton, Reid and Tucker. In *L. v. M.* (1956) 120 J.P. 27, at p. 28, Lord Goddard C.J. commented that the *Hitchcock* decision had been approved by the Court of Appeal (i.e., in *Re K.*) and "recently by the Judicial Committee." With respect, the decision in *Hitchcock* was not germane to the decision in *Murray v. Mace*; indeed, the Judicial Committee of the Privy Council specifically distinguished it.

Australia⁷⁰ in a New South Wales case was refused.⁷¹ Section 167 of the Child Welfare Act, 1939-1952, provides:—

“An adoption order shall not be made unless the court is satisfied—

- (c) if the child or person proposed to be adopted is over the age of 12 years that the child or person consents to the adoption; and
- (d) that the parents of the child . . . consent to the adoption or if the child or person proposed to be adopted is illegitimate that the mother consents to the adoption. . . .⁷² Provided that the court may dispense with the consent referred to in paragraph (c) or in paragraph (d) of the section where, *having regard to the circumstances, the court deems it just and reasonable so to do.*”⁷³

The facts of the case were as follows: The child was the illegitimate child of J., who was aged twenty-one at the time of the child's birth. The natural mother had had a particularly unsatisfactory home background and had left home at an early age, thereafter leading a nomadic existence. She had had a previous miscarriage due to a self-induced abortion and her sex life had been irregular and unfastidious.⁷⁴ She had, however, not been a vagrant nor had she by any means led an idle life, having always adequately supported herself.⁷⁵ Affiliation proceedings which the mother had commenced were withdrawn on the understanding that the child should be adopted; the mother, after some hesitancy, signed a consent form to an adoption, but although she had not seen the child after a few days of its birth, some two months later she withdrew her consent and obtained a rule nisi for habeas corpus. Leave to appeal against the rule nisi was stood over generally pending adoption proceedings being commenced; subsequently the two applications were heard and dealt with together.

The High Court of Australia, distinguishing the English cases of *Re K.* and *Hitchcock v. W.B. & F.E.B.* on the ground that “reasonableness” fell short of the meaning to be accorded to

⁷⁰ (1955) 92 C.L.R. 370, a unanimous judgment of Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ. reversing the New South Wales Supreme Court *sub nom. Re Murray* (1955) 55 S.R. (N.S.W.) 88, *per* Street C.J. and Maxwell J., Roper C.J. in Eq. dissenting. The High Court restored the order of the trial judge, McLelland J. (1953) 70 W.N. (N.S.W.) 251, granting an adoption order.

⁷¹ For the conditions to be satisfied to obtain leave to appeal, see *The Queen v. Richards; ex p. Fitzpatrick & Browne* (1955) 92 C.L.R. 171 *per* Viscount Simonds.

⁷² Under the English Act a similar result was achieved finally by judicial decision, *Re M. (an infant)* [1955] 2 Q.B. 479; see (1956) 19 M.L.R. 202, at p. 203, notes 7 and 9a. If the child is legitimated before the order is made the natural father's consent is required, *Re Le Sieur* [1951] 2 D.L.R. 775.

⁷³ The proviso was enacted in 1939 (1955) 55 S.R. (N.S.W.) 88, at p. 97.

⁷⁴ She had continually associated with friends of the “larrikin” type—the Australian equivalent of the “Teddy Boy.”

⁷⁵ See particularly on this aspect of the facts the majority decision of the Full Court of the New South Wales Supreme Court (1955) 55 S.R. (N.S.W.) 88.

"just and reasonable" in the New South Wales provision,⁷⁶ adopted the reasoning of the trial judge, McLelland J., and the dissenting judgment of Roper C.J. in Eq. in the Full Court. More specifically, the High Court concluded that, subject to the considerations set out by McLelland J., it was relevant to consider the welfare of the child. McLelland J. had set out compendiously the matters upon which he relied in granting the adoption in the following order:—

1. The initial consent to adoption.
2. The fitness of the natural mother to have custody and/or care and control of the child.
3. The ability of the natural mother to provide a home and still further her willingness and opportunity to provide a mother's attention, care and training.
4. The welfare of the child in relation to its new family; in this connection the expectation of the adoptive parents to adopt was relevant.
5. The bona fides of any revocation of the consent.⁷⁷

The Privy Council, without calling on the respondents, refused leave to appeal on the grounds that the High Court of Australia had not applied an incorrect test.

SUMMARY

At present, where it is sought in England to dispense with consent on the ground that it is unreasonably withheld, adoptions are being frustrated whenever the applicants fail to conform to the restrictive test applicable. Even though inferior courts are invested with a discretion, such discretion must be exercised judicially.⁷⁸ Since any consideration of matters other than the parent's behaviour in relation to proprietary interests would not be a judicial exercise of discretion, the opportunity to apply a test more consonant with the *leitmotif* of adoption law⁷⁹ is lost.

⁷⁶ The majority in the Full Court of the New South Wales Supreme Court (p. 98) based their decision directly on the English decisions of *Hitchcock* and *Re K.* as well as interpreting the decision in *Re Hollyman* to mean that since consent must be operative at the time of making the order, the case had to be approached as if consent had never been given and that the mother was now actively opposing the making of the order. This aspect of the majority decision was not dealt with by the High Court.

⁷⁷ Since in the instant case the trial judge had held that consent had been withheld bona fide, this consideration was not pertinent.

⁷⁸ On the scope of the discretion, see Lord Goddard C.J. in *L. v. M.* (1956) 120 J.P. 27 at pp. 28 & 29; Herring C.J. in *The King v. M* [1946] V.L.R. 106 at p. 113. Once the court has applied the right test an appellate court will be reluctant to find that the decision was unjustified, *Hitchcock v. W.B. & F.E.B.* [1925] 2 Q.B. 561, at p. 574, *per* Devlin J. In this connection the twin jurisdiction of courts of summary jurisdiction and county court with appeals to the Divisional Court and the Court of Appeal respectively is not wholly satisfactory.

⁷⁹ See a note on the Committee's Report, O. M. Stone, (1955) 18 M.L.R. 274.

The restrictive interpretation placed by the courts on section 3 (1) (c) is an expression of the predominance of the proprietary interests of the parent. The judicial view was succinctly put by Street C.J. delivering the majority judgment of the Full Court of the New South Wales Supreme Court in *Re Murray*.⁸⁰ "Only the most grave and weighty considerations would justify a court in destroying the natural link between a child and its mother against her will." Although the High Court of Australia initially expressed not dissimilar views,⁸¹ the court, in unanimously reversing the decision of the New South Wales Supreme Court, based its judgment on reasons, the tenor of which represent a balanced approach to a difficult human problem. The court said ⁸²:—

"But these considerations [*i.e.*, the tie of blood between the natural mother and her child] cannot carry such overwhelming weight where the mother, with premeditation and full knowledge of what she is about, has excluded the child from her life from the moment of its birth. In such a case, and especially where others have taken the mother's place both materially and emotionally during the period of her renunciation of him, her proved unfitness to be a mother to the child is clearly relevant to the question whether it is just and reasonable for the court to substitute those others for her in the parental status despite a new-found desire on her part to retrace her step."

In adopting as part of its judgment the five considerations made by McLelland J., the High Court of Australia has tacitly accorded recognition to the interplay of both parental rights and duties. It recognises that the existence of parental rights necessarily imports the correlative of parental duties. In arriving at the solution of the problem, the court has implicitly said that, in so far as the duties of the parent towards the child are not being or have not been fulfilled, proportionately less emphasis can justifiably be placed on the proprietary interests of the parents. The diminution of parental rights will then be assessed in relation to the best interests of the child.

Thus in testing the desirability of dispensing with consent the court may with profit adopt a dual test. The court will investigate the behaviour of the parent *qua* parent having regard to both the parental rights and duties. Any failure to perform parental duties ⁸³ will entail the consideration of other factors such as the

⁸⁰ (1955) 55 S.R. (N.S.W.) 88, at pp. 96 and 102.

⁸¹ (1955) 92 C.L.R. 370, at p. 380: "It must be a rare case in which the judicial mind can be satisfied to hold it just and reasonable that such a change should be brought about against the will of a mother." Both the judgment of Street C.J. and the High Court of Australia appear to exclude the same principle applying between the child and its father.

⁸² *Ibid.*, at p. 385.

⁸³ It may be said that failure to perform parental duties only deprives the parent of custody or care and control of the child: *Watson v. Nikolaisen* [1955] 2 Q.B. 286, *per* Lord Goddard C.J., at p. 296. This is surely a

welfare of the child, its relationship with the applicants and the latter's suitability as adoptive parents. In determining whether to dispense with consent the parental rights will be weighed with the countervailing advantages to be derived from making an order for adoption. The application of a dual test need only entail a single process. Alternatively the decision as to dispensing with the parent's consent might be dealt with on separate hearings. As will become apparent,⁸⁴ any proposal along these lines is fraught with difficulties.

Under the existing law prospective adoptive parents may apply for an adoption order immediately on receiving the child into their care and control, thereby invoking the provisions of the Adoption Act, 1950. A probationary period is satisfied by showing at the time of the hearing that "the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order"⁸⁵; hence the period of probation operates within the machinery for applying for adoption and not as a prerequisite to making the application.

On an application being made the rights of a natural parent to the writ of habeas corpus are in theory partly curtailed and in practice almost wholly extinguished, since by section 3 (4) of the Adoption Act, 1950, it is provided that during the pendency in any court of an application for an adoption order any parent or guardian who has given his consent in pursuance of the application shall not be entitled except with leave of the court to remove the infant from the care and possession of the applicant and in considering the grant of such leave "the court shall have regard to the welfare of the infant." If, however, an application is made to which no consent has been given prior to the hearing, in theory the writ of habeas corpus is available. The importance of a prompt application for adoption cannot be too strongly emphasised. In *Re Carroll*,⁸⁶ for example, the child had been in the care and possession of the foster-parents for some months but no application for adoption had been made⁸⁷ at the time when a rule *nisi* for habeas corpus was granted to the mother as against the foster-parents (and the Adoption Society to whom the child had initially

question of degree. If the failure in the exercise of parental duties is only slight, that parent may be deprived of custody. More serious failures may merit extinction of parental rights by way of an adoption order.

⁸⁴ See p. 489, *infra*.

⁸⁵ s. 2 (6) (a). Under s. 2 (6) (b) the applicant must, at least three months preceding the date of the order, have notified the welfare authority within whose area he is residing of the intention to apply for an adoption order. On s. 2 (6) (a), see *F.-Petitioners*, 1955 S.L.T. (Sh.Ct.) 12; *G.-Petitioners*, 1955 S.L.T. (Sh.Ct.) 27; *XY.-Petitioners*, 1945 S.L.T. (Sh.Ct.) 86; *A.-Petitioners*, 1953 S.L.T. (Sh.Ct.) 45.

⁸⁶ [1931] 1 K.B. 317 in the Divisional Court before Lord Hewart C.J., Avory and Wright J.J. affirming Charles J.; reversed on appeal by Scrutton and Slesser L.J., Greer L.J. dissenting.

⁸⁷ The mother had in fact given her consent to the adoption on a blank form: *Re Carroll* [1931] 1 K.B. 317, at p. 319, *per* Slesser L.J., at p. 329, *per* Scrutton L.J. and at p. 340, *per* Greer L.J.

been entrusted and with whom the child resided after the issue of the writ). The court's inquiry was therefore directed to the relevant Acts dealing with custody of children and more specifically with section 1 of the Guardianship of Infants Act, 1925.⁸⁸ Had an application for adoption been pending the court would have had to consider the very different provisions applicable.⁸⁹ In *Mace v. Murray*, by contrast, the foster-parents had the perspicacity to make their application immediately on receipt of the writ of habeas corpus and the court thereupon treated the two applications simultaneously; the foster-parents were thereby enabled to invoke in the proceedings the proviso to section 167 (d) of the Child Welfare Act. So long, therefore, as an application can be made on the placement of the child any proceedings for habeas corpus may effectively be countered by invoking the relevant provisions of the Adoption Act.

Even so the results achieved may not be satisfactory. In the joint proceedings the court may refuse to dispense with the parent's consent and yet refuse a rule absolute of habeas corpus on the ground that the child's removal from the foster-home would be both capricious and cruel.⁹⁰ Such a result cannot satisfy either party to the dispute and fails to do justice to the child. The effect is to perpetuate the status quo, at the same time leaving open the door to subsequent applications for custody. It would seem highly desirable that the test for the custody of a child be the same as the test for dispensing with any consent, so that the result of the proceedings is either to return the child to its parent or to make an order for adoption. Any half-way house as a compromise solution should be reserved for the rare cases where neither decision appears just, in which case the prospective adopters must decide to drop the application and continue as foster-parents or allow the child to be taken in by the local authority until the natural parent is capable of receiving the child⁹¹ or consents to an adoption by the same or other foster-parents.

The problem does not at present pose any such difficulties. The present test of "unreasonably withheld" is generally the same as the test for granting custody to a parent as against a stranger. It is only where there has been a grave dereliction of duty on the part of the parent that consent will be dispensed with or a rule absolute of habeas corpus refused⁹²; only a much less restrictive

⁸⁸ See "The Paramountcy of the Child's Welfare," (1955) 18 M.L.R. 490.

⁸⁹ Particularly might this have been so in view of the fact that the operative section, s. 2 (3) of the 1926 Act, contained the wider discretionary rule.

⁹⁰ *The King v. M.* [1946] V.L.R. 106. See also Lord Goddard C.J. in *Watson v. Nikolaisen* [1955] 2 Q.B. 286, at p. 297.

⁹¹ The results of such a move are also not likely to be conducive to the best interests of the child, see *Re A.B. (an infant)* [1954] 2 Q.B. 385, a decision under s. 1 of the Children Act, 1948.

⁹² In a dispute between a parent and a stranger the welfare of the child is not a paramount consideration, despite the apparently clear wording of s. 1 of the Guardianship of Infants Act, 1925, (1955) 18 M.L.R. 490, at p. 492, cf. *Price v. Cargin and Cargin* [1956] 4 D.L.R. 652.

interpretation of section 3 (1) (c) would establish a disparity in the tests for dispensing with consent and for custody.

The introduction of a new clause for dispensing with consent which reposed in the courts the duty to consider factors other than the proprietary interests would create the disparity which it is desirable to avoid. Any provision which entailed delaying the entitlement to present an application for adoption would create a hiatus so long as section 1 of the Guardianship of Infants Act, 1952, incorporating the welfare principle was inapplicable to the parent-stranger dispute. The Committee's recommendations on this problem of the probationary period need therefore to be welcomed with caution. The report states⁹³:

"We have been impressed by the fact that three months has proved to be insufficient in a large number of cases and by the plea that a certain time should always elapse between the date of receiving a child and the date of the application for an adoption order. The idea of lodging an application the day after receiving the child has little to commend it, because it allows no time for the child and the adopters to get used to each other and for possible difficulties to be adjusted and we recommend that in future it should not be permissible to lodge an application until two months after the child was coming to the adopter's home."

Any enactment giving effect to this recommendation would require amendment to section 1 of the Guardianship of Infants Act, 1925, so as to bring that section into line with any test for dispensing with consent. Where a child is received into the home of a stranger with a view to adoption, the Guardianship of Infants Act, 1925, ought to be amended to the effect that the same principles are to apply as if the foster-parents were then asking the court to dispense with consent in adoption proceedings, *i.e.*, that the parent may not recover the child without leave. This, moreover, need not preclude the examination of the position for the purposes of dispensing with consent on the hearing of the application for adoption.⁹⁴

CONCLUSIONS

1. The power to dispense with consent on the ground that such consent is unreasonably withheld is at present restrictively

⁹³ Para. 66, p. 18.

⁹⁴ This is exemplified by the facts of *Re Aster* [1955] 1 W.L.R. 465; [1955] 2 All E.R. 202, *sub nom. Re A. (an infant)*. There the putative father of a child successfully sought the custody of his child from the mother who was proposing to have the child adopted; the child had been placed with an adoption society but not with prospective adoptive parents. Since the litigation involved a dispute between the parents, no question of dispensing with consent to adoption arose. It is curious to note that had the child been placed with foster-parents who had applied for adoption the mother would have consented, and the father's consent would not need to have been sought since he was not a "parent" within s. 2 (4) (a) of the Act, nor did it appear that he was "liable by virtue of any order or agreement to contribute to the maintenance of the child": *Re M. (an infant)* [1955] 2 Q.B. 479.

interpreted. The test looks not to the behaviour of the parent *qua* parent but to the parental rights which will be extinguished by an adoption order.^{94a}

2. It is clear that the change in the wording from the proviso to section 2 (3) of the 1926 Act to the interpretation put upon section 3 (1) (c) of the 1950 Act has produced a violent swing of the pendulum. The Committee has recommended a redressing of the balance. An enactment on the lines of the proviso to section 167 (d) of the New South Wales Child Welfare Act, 1939-1952, which the Privy Council recently had the opportunity of reviewing, is suggested as a worthy substitute. Any such enactment might well enumerate the several matters listed by McLelland J. in *Re Murray* as being relevant to the consideration when consent may be dispensed with.

3. To bring the law of parent and child into line a rule should be introduced into the law of guardianship, where a child has been boarded out with a view to adoption, so as to prevent a parent from depriving foster-parents of the opportunity of making an application for adoption if a probationary period is instituted, as envisaged in the Committee's Report. Section 3 (4) of the 1950 Act could conveniently be enlarged to incorporate such a provision.

This raises the possibility alluded to above of dealing with the problem at separate hearings, so that on the application for adoption there might be no complicating factor of parental consent. This would be a compromise between the present rule in *Re Hollyman* and a provision making withdrawal after placement irrevocable. It would not, however, be opportune to deal with consents at a separate hearing. It is true it would have the advantage of eliminating this complicating factor from the hearing of the application itself, but it would not be practicable because the guardian *ad litem* might report unfavourably both on the parent who withholds his consent and on the foster-parents. A separation of the two issues might thus lead to a decision to dispense with consent and a subsequent decision to refuse the application. The following is offered as an alternative solution:—At the time of the placement by an adoption society or local authority, the society or authority concerned must seek the concurrence of the natural parent or guardian to the former society or authority having custody; any objection by the natural parent or guardian must be settled by the courts. Either with the concurrence of the natural parent or guardian or by the decision of the court the society or authority will become invested with custody; on the application for adoption the society or local authority will give its consent to the application or the court may dispense with it if, having regard to all circumstances, it thinks

^{94a} It may be put in the form that the parent does not wish to abandon parenthood, see *Re M. (an infant)* [1955] 2 Q.B. 479, at p. 492, *per* Birkett L.J.

it right to do so.⁹⁵ The natural parent or guardian will not be a party to these proceedings.

Such a procedure would have the added merit of promoting adoptions through the societies and local authorities rather than the "third party" placings, since the latter method of arranging adoption would retain the element of risk that presently exists whenever an applicant seeks to obtain an order dispensing with any consent.

4. In spite of repeated remonstrations from the courts that adoption proceedings are *sui generis* and not *in pari materia* with custody proceedings,⁹⁶ it is clear that the two cannot be isolated from each other. Enough has been said to indicate the interdependence of the two problems. Indeed, the problem of consents is yet another facet of the growing need for a single statute on the law of children.

The prospect of legislation on the subject of adoption, on the cruelty to and neglect of children⁹⁷ consequent upon the forthcoming report of a committee under the chairmanship of Lord Ingleby,⁹⁸ and on the recommendations of the Royal Commission on Marriage and Divorce⁹⁹ provides a unique opportunity to overhaul the piecemeal legislation on the subject and provide the country with a single statute.¹ Such a statute should not be born of the desire for legislative elegance but should provide all those who deal with children the sense that here in a compact form is the body of law, replacing the present search for relevant provisions from a mass of disparate sources.

Postscript

After this article had gone to print the writer's attention was drawn to an address made by the Home Secretary, Mr. R. A. Butler, to the Women Conservatives' Conference in London on May 21, 1957. Referring to the Hurst Committee's report, the Home Secretary stated that whilst the Government intended to carry out legislative reform of the Adoption Act, no undertaking as to the precise date or session when legislation would be sought could be given. The Home Secretary went on: "I cannot yet assure you that I shall consider it right to accept all the Hurst

⁹⁵ An example of this was demonstrated in *W. & another v. D. & another* (1956) 54 L.G.R. 80; (1956) 120 J.P. 119, where the adoption society supported the natural mother's opposition to an order.

⁹⁶ *Skinner v. Carter* [1948] Ch. 389, at p. 394, *per* Lord Greene M.R.

⁹⁷ See report of a Joint Committee of the British Medical Association and the Magistrates Association on "Cruelty to and Neglect of Children," 1956, published by the B.M.A.

⁹⁸ H.C. Debates, July 2, 1956, Vol. 555, Cols. 1028—the Home Secretary intimated that the Committee's work would begin in the Autumn, 1956.

⁹⁹ Cmd. 9678, Part V, p. 103.

¹ This is not a novel suggestion. A similar plea was made at the time of the first committee inquiring into the desirability of legal adoption under the Chairmanship of Sir Alfred Hopkinson, K.C., M.P., *Journal of Comparative Legislation*, 3rd Ser., Vol. II (1920) 3, at p. 9. See also "The Law of Parent and Child," *The Listener* (1956) December 13, Vol. LVI, p. 985.

Committee's recommendations. . . . I think that most of the recommendations will find a ready acceptance with the Government and Parliament but there are others that raise difficult issues and must give us pause before we change the law of the land. For example, it must always be a matter of deep concern to decide the circumstances in which a court may grant an adoption order without the consent of the child's parents." Commenting on the specific provision in section 3 (1) (c) of the 1950 Act the Home Secretary concludes: "At first sight the Committee [in its recommendation] seem to be right, but I think we must reflect carefully before we decide on any new provision that makes it easier for a parent to be deprived of a child without consent."

L. J. BLOM-COOPER.*

* LL.B.(London), DR.JUR.(Amsterdam); of the Middle Temple, Barrister-at-Law.

LEGISLATION

HOUSE OF COMMONS DISQUALIFICATION ACT, 1957

THE grossest anomalies in the law relating to disqualification for membership of the House of Commons have at last been removed by the passing of the House of Commons Disqualification Act, 1957.¹ Reform, although inevitable, has indeed been gradual. A draft Bill was prepared as long ago as 1943 to give effect to the 1941 Report of the Select Committee on Offices and Places of Profit under the Crown.² But parliamentary time could not be found for so complex and politically unrewarding a measure until 1955. The Bill then introduced was committed to a Select Committee of the House which recommended several important amendments.³ The Bill was not passed into law in the 1955-1956 session, but it was re-introduced in November, 1956, in substantially the form in which it had emerged from the Select Committee. Only minor amendments were made to the Bill during its passage through Parliament during the 1956-1957 session.⁴ The salient features of the Select Committee's Report have already been commented on^{4a} at pp. 52-54 of this Volume, but in view of the constitutional importance of the Act its main provisions may be summarised here.

1. Disqualification for membership ceases to derive from the holding of "an office or place of profit under the Crown," and now derives from the holding of specific disqualifying offices, namely (s. 1), the holding of any of the full-time judicial offices named in Part I of the First Schedule, employment in the civil service of the Crown, membership of the regular armed forces of the Crown (with certain exceptions), membership of a local police force, membership of a legislature outside the Commonwealth, and the holding of any of the numerous other disqualifying offices set out in Parts II and III of the First Schedule. Part II of the Schedule lists commissions, tribunals and other bodies of which all members are disqualified, and Part III lists a number of other disqualifying offices (*e.g.*, Clerk of Assize, Comptroller and Auditor General, Governor of the B.B.C., Registrar of Restrictive Trading Agreements). Few will contend that the tenure of any of the appointments listed would be compatible with membership of the House of Commons. In addition, the holders of any of the offices listed in Part IV of the Schedule are disqualified for particular constituencies. Thus, a borough recorder and a chairman and deputy

¹ The Act also applies, with certain modifications, to disqualification for membership of the Senate and House of Commons of Northern Ireland.

² H.C. 120 of 1940-1941.

³ H.C. 349 of 1955-1956.

⁴ For the House of Commons debates on the Bill, see 562 H.C. Deb. 1280-1316; 565 H.C. Deb. 1048-1111, 1171-1193; 566 H.C. Deb. 356-460, 1065-1082.

^{4a} By Mr. J. A. G. Griffith.

chairman of quarter sessions are disqualified for constituencies to which the jurisdiction of their courts extends.

2. The content of the lists of scheduled disqualifying offices may be amended by Order in Council made in accordance with a resolution of the House of Commons to that effect (s. 5).

3. No member of the House, and no person nominated as a candidate, is to be obliged to accept a disqualifying office (*e.g.*, the office of sheriff, which disqualifies for constituencies in the county concerned), other than membership of the armed forces (s. 8).

4. Acceptance of the office of steward or bailiff of the Chiltern Hundreds or the Manor of Northstead will continue to disqualify (s. 4); vacation of a seat in the Commons is, therefore, still effected by acceptance of a disqualifying office and not by resignation.

5. The House of Commons is empowered (s. 6 (2)) by order to direct that disqualification under the Act shall not apply in a case where the grounds for disqualification which subsisted at the material time have been removed. No such order may affect proceedings on an election petition. The statutory grant of this dispensing power to the House should obviate the needs for Acts of Indemnity.

6. The former disqualifications attaching to Crown pensioners and contractors are removed (s. 9).

7. The law relating to the number of Ministers who may sit and vote in the Commons at any one time is amended. A list of ministerial offices is set out in the Second Schedule and is divided into two parts. Of the holders of these offices, seventy persons in all and twenty-seven holders of offices in the first part (which comprises full ministerial offices—the Law Officers of the Crown and junior ministerial offices are placed in the second part) are qualified to sit and vote in the Commons at any one time (s. 2). This affords a generous degree of latitude; in April, 1957, when the Bill became law, only twenty-four of the holders of offices in the first part of the Schedule, and sixty-three in all, were members of the Commons; the remainder were in the Lords. When one bears in mind that there are also four assistant unpaid Government Whips and upwards of twenty Parliamentary Private Secretaries (who do not hold scheduled offices), one sees that the effective strength of the Government in the Commons may now be almost a hundred, though it is likely to be in the region of eighty-five. It is a far cry to the Act of Settlement, which purported to exclude all holders of offices of places of profit under the Crown from membership of the Commons, and even to the Succession to the Crown Act, 1707, which limited the disqualification to the holders of offices created after October 25, 1705. The growth of responsible government, the proliferation of new departments of State and the enactment of amending legislation have brought about a state of affairs in which members of the Government and M.P.s standing at the periphery of the

■

Government are likely to comprise as much as one quarter of the Government side of the House of Commons. The diminution of the number of Government backbenchers has inevitably affected the character of parliamentary debates.

8. The question whether a person has incurred a disqualification under the Act will be determinable upon an application made by any person to the Judicial Committee for a declaration (s. 7). The applicant must give security for costs and the Judicial Committee may direct that any issue of fact be tried by the High Court or the corresponding courts in Scotland and Northern Ireland. The common informer is thus deprived of his right (which survived the Common Informers Act, 1951) to sue the disqualified member for a penalty of £500 a day in respect of the disqualifications now specified in the 1957 Act; but he is still at liberty to pursue his acquisitive course against clergymen who transgress against section 2 of the House of Commons (Clergy Disqualification) Act, 1801.⁵ In 1953 the Select Committee on Clergy Disqualification, after reviewing the intriguing anomalies of this part of the law, recommended that no change be made in advance of legislative provision for amendment of the law relating to disqualification for membership of the House generally.⁶ The present Government has thought it prudent to leave this hornet's nest undisturbed.

S. A. DE SMITH.

⁵ The common informer's action for penalties under section 7 of the Parliamentary Elections Act, 1695, against a member disqualified for infancy seems to be preserved, but it is not clear what are the penalties that may be claimed.

⁶ H.C. 200 of 1952-1953.

NOTES OF CASES

“TRADE DISPUTE” AND PERSONAL DISPUTES IN A UNION

*Huntley v. Thornton*¹ is a case of particular legal interest, for implicit in the judgment of Harman J. is an important amendment of one of the most influential but least litigated statutory definitions in English law, the meaning of a “trade dispute” in the Trade Disputes Act, 1906. The facts of the case are lengthy, but an accurate understanding of the nature of the decision requires their full recital.

On refusal by the employers of a wage increase, the Federation of Shipbuilding and Engineering Unions recommended all its constituent unions, including the Amalgamated Engineering Union, to call a twenty-four hours’ strike² on December 2, 1953. The Executive Council of the A.E.U. resolved to this effect, and, consequently, on December 1, 1953, A.E.U. members in the shipyard of William Gray & Son at Hartlepool received printed leaflets instructing them to stop work for the period of the following day. Huntley, a fitter and turner at Gray’s Yard, refused to obey because, apparently, he had consulted the union rulebook during the lunch hour and concluded that it contained no clear power to call such a strike³; and he unsuccessfully tried to persuade a fellow-member to join him. On December 2, Huntley came to work as usual. This naturally made his fellow unionists extremely angry; and when the employer turned down their request to dismiss him, they sent him to “Coventry.”

Huntley appears to have stated his views in the regional Press. At his branch meeting, however, he was denied the opportunity of ventilating his position, but, after he had left, the branch resolved and wrote to the Hartlepool District Committee that Huntley be expelled. At the subsequent District Committee meeting there was a heated exchange between Huntley and the committee members ending in Huntley’s exit in high dudgeon, after describing the committee comprehensively as a “shower.” The committee then resolved to recommend to the Executive Council that Huntley be expelled for (a) refusing to carry out the Executive Council’s instructions; (b) his “arrogant attitude” at the meeting; and (c)

¹ [1957] 1 W.L.R. 321; also reported in [1957] 1 All E.R. 234.

² On this Harman J. said: “if labour is to be withdrawn without such notice as is required by the various contracts of the strikers with their employers it is an illegal strike and none the less illegal because the several unions who approve it are protected from action by section 4 of the Trade Disputes Act” (at p. 325).

³ Harman J. was inclined to agree with him (at p. 325), but the case did not require any firm conclusion on the point.

"his attempt to coerce other brothers at his place of employment."⁴ The Executive Council wisely refused, in what Harman J. described as a "sensible and moderate answer." On two further occasions within the next week or so the District Committee recommended expulsion to the Executive Council, but was refused each time.

Meanwhile, under the strain of his ostracism, Huntley finally left Gray's Yard and went to work in Bradford, eighty miles from his home and at less pay. After two weeks there, on January 18, 1954, he decided that he had to secure employment in the Hartlepool area. He was interviewed by the Press and communicated his intention to it.

The District Committee, on learning of his intention, circularised all shop-stewards in the Hartlepool district asking them to "ensure that Huntley is not allowed to start work under any consideration."⁵ The Committee also wrote to Thornton, secretary of the neighbouring Tees-side district, asking him to assist in the boycott. This letter was in prejudiced terms, which Thornton accepted at their face value. In particular, it refrained from saying that Huntley was still a union member and that his expulsion was on three occasions unreservedly refused by the Executive Council.

Owing to the antagonistic attitude of the shop stewards and workers thus engendered in the Hartlepool district, Huntley's applications for work there failed. At the beginning of February, 1954, however, he secured employment at the B.E.A.'s power station in Stockton, nine miles from Hartlepool and in the Tees-side district of the A.E.U. In less than two weeks he was dismissed from this work too owing to the intervention of Thornton and Langford (A.E.U. convenor of shop stewards at the power station), who, in support of what they thought to be a bona fide trade dispute between Huntley and his District Committee, requested his dismissal under threat of a withdrawal of union labour.

Huntley now tried to make his peace with the Hartlepool District Committee, and also tried to obtain a 1954 contribution card to clear off the arrears of his subscriptions which he had not paid since the original, fateful interview with the committee. The further interview he now sought was refused. The 4s. he sent his branch secretary in respect of his arrears were returned, and his repeated requests to the branch secretary for a current contribution card were ignored.⁶ On June 8, 1954, while the figure of £3 3s. 6d. for arrears was apparently still in dispute between the branch secretary and Huntley's solicitor, Huntley was expelled for having

⁴ At p. 330.

⁵ At p. 332.

⁶ This was a breach of the branch secretary's duty under the rules of the A.E.U.'s rulebook.

"allowed" his arrears to exceed twenty-six weeks' contributions.⁷ Thereafter, he was intermittently employed until May, 1955, when he was taken on permanently in the Admiralty Spare Parts Department in Stockton, fifteen miles from his home, and an open shop so far as the A.E.U. was concerned.⁸

Huntley's action was for damages and an injunction for civil conspiracy in its general form against Thornton and Langford and the ten members of the Hartlepool District Committee.

The case against Thornton and Langford failed on the common law defence that what they did was for the predominant and bona fide purpose of protecting their trade interests, that is to say, the trade interests of their union. Being ignorant of the inner history of the conflict between Huntley and his District Committee, they acted in what they sincerely believed to be the true interests of the union.

It was otherwise, however, in the case of the District Committee members themselves.

It might well have been said in the early days after the twenty-four hours' strike that the committee members honestly thought that nothing would uphold the prestige of the union in the district except the plaintiff's expulsion.⁹ But once the Executive Council had made it absolutely plain that it would not countenance Huntley's expulsion, the situation underwent a radical change. The one day strike issue was closed and the persecution of Huntley that followed could only be attributed, on the facts, to a desire by the District Committee to punish him for his public opposition to them personally. "By this time the District Committee had entirely lost sight of what the interests of the union demanded, and thought only of their own ruffled dignity. . . . It had become a question of the District Committee's prestige; they were determined to use any weapon ready to their hand to vindicate their authority, and grossly

⁷ Plainly a wrongful expulsion. Huntley had not been permitted to pay his arrears; how then could he be said to have "allowed" them to exceed 26 weeks' contributions? It was, however, unnecessary for Harman J. to decide this point, and he left it open (at p. 338).

⁸ Expulsion from a union enjoying a near closed shop, like the A.E.U. in the Hartlepool district, provoked in Harman J. the following interesting reflection: "It is not for English lawyers to dislike or distrust the principle of the closed shop, for they are all members of a society which itself lives and thrives on this principle. No man, unless he has served his time and received his union card—that is to say, his call to the Bar—may (save in his own cause) address the Supreme Court of England. Such monopolies are only justified if they are so regulated as to promote the public interest. Moreover, the weapon of expulsion from such a society is a step of the most extreme gravity, only to be entered on after very careful inquiry and in the case of the very gravest offence" (at p. 328). What is "the very gravest offence?"

⁹ Harman J. said *obiter* that, though this view "might be arguable," he thought it "so wrong headed that it would be hard to accept it" (at p. 340). This dictum is of profound juristic importance. It ignores the law consistently stated in the House of Lords since 1892 that the question of predominant and bona fide purpose is one of fact, and turns that question technically into one of law by—semble—insisting that the court is entitled to weigh the reasonableness of trade union reaction to those who dissent from an official union decision (quite apart, apparently, from rulebook uncertainties).

cf
p. 338
87 v L
116
L.C.

abused the quite frightening powers at their command.”¹⁰ For them, therefore, the common law defence failed.

But the District Committee members had a second string to their bow. They had pleaded not only the common law defence to the action for conspiracy but also the statutory defence provided by section 3 of the Trade Disputes Act, 1906, which overrides the common law position. Under section 3 the defendants would have avoided liability had they been able to satisfy the court that the steps they took to exclude Huntley from employment in the Hartlepool and neighbouring districts were acts done “in contemplation or furtherance of a trade dispute,” by which, in a case like *Huntley*, is meant “any dispute . . . between workmen and workmen . . . which is connected with the employment or non-employment . . . of any person.”¹¹

The learned judge with great justification held on the facts that the dispute was not a “trade dispute,” and by way of remedy gave leave to Huntley to apply for an injunction in the event of renewed victimisation, and awarded £500 damages. The main basis for the calculation of this sum was Huntley’s loss of earnings; but the precise material loss suffered was not, in a case of this kind, to be weighed on “golden scales,”¹² as the learned judge put it. He refused, however, to give a greater sum by way of punitive damages.

The legal significance of Harman J.’s decision derives from the fact that the dispute between Huntley and the Hartlepool District Committee was a dispute among workmen about the employment or non-employment of any person, *i.e.*, Huntley. The definition of trade dispute in the 1906 Act is so framed that, at first sight, its literal words do seem to include the facts in the Hartlepool affair. To take that affair out of the Act, some qualification of the meaning of “trade dispute” was needed.

Harman J. held, approving dicta in *Conway v. Wade*,¹³ that the dispute was not a trade dispute because, “The defendants were not asserting a trade right,”¹⁴ because “no interests of ‘the trade’ were involved,”¹⁵ because, “It was a personal matter.”¹⁶ In the light of these reasons it may be suggested that it would now be proper to regard the statutory definition of “trade dispute” as

¹⁰ At p. 341.

¹¹ Trade Disputes Act, 1906, s. 5 (3).

¹² At p. 350.

¹³ [1909] A.C. 506.

¹⁴ At p. 349.

¹⁵ At p. 350.

¹⁶ *Ibid.* Harman J. stated that behind the trade dispute issue lay “a more fundamental point, namely, whether the Committee’s actions were ‘in furtherance of a trade dispute’” (p. 350). With great respect, I have been unable to follow this line of reasoning. Surely the question of trade versus personal dispute was the prior and fundamental point. Once the dispute was held not to be a trade dispute, the question of “furtherance” ceased to be material. Indeed, in dismissing the question of “furtherance,” the learned Judge said: “They were not furthering a trade dispute, but a grudge” (p. 350)—which seems to recognise that the nature of the dispute was the fundamental issue.

qualified by the common law notion of predominant purpose in civil conspiracy; that, now, in the circumstances of an inter-workmen dispute, a trade dispute is "any dispute . . . between workmen and workmen . . . which is connected with the employment or non-employment . . . of any person" and which is conducted for the predominant purpose of promoting trade interests; and possibly the qualification applies to the statutory definition as a whole. The question of a trade dispute has long been established as one of fact, and therefore it is left to the courts to determine on the particular facts of each particular case whether a dispute was to trade ends, including upholding union as distinct from purely personal prestige, or whether a dispute involved the use of trade union power to attain some purely personal object.

C. GRUNFELD.

TRESPASS OR CASE

Two cases ¹ appearing in the same weekly issue of one series of law reports ² provide an interesting illustration of one of the distinctions between trespass and case, namely, whether the injury is direct or consequential.

In the first of these, *Davey v. Harrow Corporation*,³ the damage complained of was caused by the encroachment of the roots of a tree from the defendant's land into that of the plaintiff. This is not by any means the first occasion on which the encroachment of roots or branches has come before the courts, and Lord Goddard C.J., giving the judgment of the Court of Appeal, regarded it as settled law that such encroachment is not to be regarded as a trespass, but as a nuisance. There seems little doubt that this is right, though it may follow that *Simpson v. Weber*⁴ was wrongly decided. It is, perhaps, a little curious to find that in addition to *Lemmon v. Webb*,⁵ which remains the leading authority both for regarding the encroachment of branches as a nuisance, and for treating the encroachment of roots on exactly the same footing, *Pickering v. Rudd*⁶ and *Lonsdale v. Nelson*⁷ were cited as authorities on this point in preference to *Butler v. Standard Telephones and Cables, Ltd.*,⁸ although this case was cited to the court.⁹ On the one hand, in *Pickering v. Rudd*,¹⁰ Lord

¹ *Davey v. Harrow Corporation* [1957] 2 All E.R. 305; [1957] 2 W.L.R. 941 and *Kelsen v. Imperial Tobacco Co., Ltd.* [1957] 2 All E.R. 343; [1957] 2 W.L.R. 1007.

² [1957] 2 All E.R., Part 6, dated May 23.

³ *Supra*.

⁴ (1925) 41 T.L.R. 302. In this case the growth of Virginia creeper was treated as a trespass.

⁵ [1894] 3 Ch. 1 affirmed H.L. [1895] A.C. 1.

⁶ (1815) 4 Camp. 219; 1 Stark 56.

⁷ (1823) 2 B. & C. 302.

⁸ [1940] 1 K.B. 399.

⁹ See the list of cases cited in argument but not referred to in the judgment [1957] 2 W.L.R. 941 at p. 942.

¹⁰ *Supra*.

Ellenborough was chiefly concerned not with a tree, but with an artificial projection. In so far as he was concerned with a natural growth—a Virginia creeper—it was admitted on the pleadings that it caused damage and that some breaking by the defendant was justified. The only question to be decided, therefore, on this issue, was whether in removing the mischief the defendant had done more damage than was necessary—a question of fact which was left to the jury. *Lonsdale v. Nelson*¹¹ was not concerned with encroachment or overhanging at all, and is only relevant in this context in respect of an *obiter dictum* by Best C.J.,¹² referring to the right to abate nuisances of omission such as those caused by overhanging branches. On the other hand, *Butler v. Standard Telephones & Cables, Ltd.*¹³ was a clear and direct authority to the effect that the encroachment of roots is merely a nuisance.

A further point which, for practical purposes, can now be considered as settled by *Davey v. Harrow Corporation*¹⁴ is that no distinction is to be drawn in this type of case between trees self-sown and those deliberately planted. The fundamental basis of the decision on this point seems to have been that, in the absence of authority, there was no ground for introducing such a distinction. The case of *Crowhurst v. Amersham Burial Board*,¹⁵ which seems to be the only case which could be found possibly in favour of the distinction, was explained as being founded not on nuisance but on *Rylands v. Fletcher*,¹⁶ and such weight as it might have carried was regarded as more than counterbalanced by the subsequent decision of *Smith v. Giddy*.¹⁷ Here the court, although it treated the case as analogous to *Crowhurst v. Amersham Burial Board*,¹⁸ does not appear to have made any finding that the trees were planted artificially, or to have thought that this was necessary to ground the defendant's liability. The reliance on *Noble v. Harrison*¹⁹ seems, however, to be rather unfortunate. The plaintiff there rested his case on the alternative grounds of, first, nuisance, and secondly, *Rylands v. Fletcher*,²⁰ and it was purely in relation to this latter ground of claim that it was said there was no difference between trees planted and trees self-sown. The distinction was not discussed with regard to the claim in nuisance.

The other case to be discussed is *Kelsen v. Imperial Tobacco Co., Ltd.*²¹ Here the plaintiff was the lessee of a single storey building

¹¹ *Supra*.

¹² *Supra*.

¹³ *Supra*.

¹⁴ *Supra*.

¹⁵ (1878) 4 Ex.D. 5.

¹⁶ (1868) L.R. 3 H.L. 330.

¹⁷ [1904] 2 K.B. 448.

¹⁸ *Supra*.

¹⁹ [1926] 2 K.B. 332.

²⁰ *Supra*.

²¹ [1957] 2 W.L.R. 1007; [1957] 2 All E.R. 343.

which, it was held, in the absence of anything sufficient to displace the *prima facie* rule, included the air space above it. The defendant was the lessee of an adjoining three-storey building, and affixed an advertising sign on his wall which necessarily projected therefrom and thereby invaded the plaintiff's air space. It is submitted that McNair J. rightly followed the weight of authority in deciding that the invasion of the plaintiff's air space constituted a trespass. The authorities for the other view consist of Lord Ellenborough's remarks in *Pickering v. Rudd*,²² followed by Hawkins J. in *Clifton v. Viscount Bury*.²³ These authorities can be disregarded with a clearer conscience when it is realised that Lord Ellenborough's decision was at *nisi prius*, and, further, it appears from the report in Starkie that it afterwards turned out that the board complained of did not in fact overhang, so that Lord Ellenborough's dicta on this point can perhaps be treated as *obiter*.

Since, as has been seen, roots and branches are legally in the same category, these two recent cases provide a fresh illustration of the rule that while my neighbour can only bring an action on the case if the branches of my tree overhang his land, if I fell the branches and use the wood²⁴ to erect some projection which invades his air space, he has his action in trespass. Even though I plant the tree which subsequently puts its branches into his air space, the injury is still not direct but consequential,²⁵ and thus the remedy is in nuisance; but if I put out some artificial projection, though it does no harm and does not diminish my neighbour's enjoyment of his land, it is trespass. •

By way of postscript, it is interesting to note that it is neither trespass nor nuisance on the part of the occupier of land adjoining the highway for him to have either trees with branches or artificial projections that overhang it, so long as they neither obstruct the highway nor constitute a source of danger. If damage is done owing to the collapse of the projection, whether natural or artificial, the occupier may be liable in either case in nuisance in the rather special form of nuisance to a highway. Curiously enough, a distinction is also drawn here between things naturally on the land, such as the overhanging branches of trees, and artificial things. This distinction does not, however, affect the nature of the remedy—in either case it is nuisance—but the extent of the duty of the occupier, which is considerably greater in the case of artificial things.²⁶

P. H. PETTIT.

²² *Supra*.

²³ (1887) 4 T.L.R. 8.

²⁴ It is of course still my wood even if my neighbour cuts the branch in exercise of his right of abatement—*Mills v. Brooker* [1919] 1 K.B. 555.

²⁵ Nor does it make any difference that I intend the tree to grow and invade my neighbour's air space. Cf. *Leame v. Bray* (1803) 3 East 593.

²⁶ Contrast, e.g., *Noble v. Harrison*, *supra*, and *Caminer v. Northern & London Investment Trust, Ltd.* [1949] 2 K.B. 64 affirmed H.L. [1951] A.C. 88, with *Tarry v. Ashton* (1876) 1 Q.B.D. 314; *Wringe v. Cohen* [1940] 1 K.B. 299; *Mint v. Good* [1951] 1 K.B. 517.

FINES PAYABLE OUT OF THE DECEASED OFFENDER'S ESTATE

As an instrument of correction, the fine has been regarded with almost contemptuous indifference by most criminologists.¹ Yet in 1955 no less than 93·3 per cent. of all persons found guilty in magistrates' courts of non-indictable offences were fined, while in the higher courts, where the use of the fine is naturally less frequent, nearly half the offenders aged twenty-one and over were dealt with by this means. The total value of fines imposed has been estimated at well over a million pounds per annum.²

What sort of an instrument of correction is it? The fine does not pretend to reform, but rather seeks to deter,³ yet it seems that it is exceedingly popular with the courts, and is presumably regarded as effective. The fact that it has been regarded as purely deterrent may account for the lack of interest by criminologists. But it may well be an instrument of reform. The recent Cambridge survey of sexual offences indicates that the fine is one of the most effective methods of dealing with certain types of sexual offender. Clearly the fine deserves more attention as a means of disposition of offenders than it has hitherto received.

The courts have already had to answer several questions concerning this means of disposition. In what circumstances should it be imposed, and what principles should govern the amount of the penalty?⁴ Should the fine be coupled with probation?⁵ Now comes the question, is the fine personal to the offender, or can the liability to pay devolve on death so that the offender's estate is liable? This was the question answered in the Queen's Bench Division in *Treasury v. Harris*.⁶ Lord Goddard C.J. held that a fine is a debt to the Crown and as such it is payable out of a deceased offender's estate if the offender dies without paying it or serving any period of imprisonment ordered in default of payment. At first sight this decision would seem to have the effect of suffering the sins of the ancestor to be visited on his descendants, or, in more modern parlance, depriving the widow and the next-of-kin of their inheritance. Is it right to punish the survivors in this way? This is a superficial reaction, and considerations both ethical and legal point to the correctness of the decision, however hard it may seem at times.

The answer in ethical terms may be seen to be correct if the situation of the survivors is put in this way: that their position is not to be altered in their favour by reason only of the unfortunate

¹ See, for example, Margery Fry, *Arms of the Law*, 1951, p. 121: "Perhaps a fine hardly serves the analogy of a weapon in the armoury of law. It is little more than a penknife serving to scratch out, not without friction, minor errors of conduct."

² *Ibid.*

³ *Ibid.*

⁴ *R. v. Markwick* (1953) 37 Cr.App.R. 125.

⁵ No, according to *R. v. Parry* [1951] 1 K.B. 510; nor should it be coupled with an order of conditional discharge, *R. v. McClelland* (1951) 35 Cr.App.R. 22.

⁶ [1957] 3 W.L.R. 12; [1957] 2 All E.R. 455.

circumstance of the death of the offender. More cogently perhaps, from the Crown angle: that the position of the Crown is not to be altered unfavourably by this fortuitous event. If the offender had lived, he would have had to pay the fine or serve imprisonment in default. Now that he is dead the only difference is that he cannot be sent to prison in default of payment. The estate is liable for the amount of the fine, and this is a proper charge; presumably the personal representatives, who stand in the shoes of the deceased, so to speak, might by refusing to pay find themselves sitting in his cell!

The answer to the question from the point of view of the law turns upon the interpretation of sections 13 and 15 of the Criminal Justice Act, 1948, which altered the law and procedure concerning the imposition of fines. Not only were fines made available for the first time in cases of felony (other than manslaughter, which has been finable since 1861), but a new procedure was laid down. Misdemeanours had always been finable, and as Lord Goddard explained in *R. v. Brook*,⁷ in such circumstances "the courts constantly ordered the prisoner to remain in custody until the fine was paid." When this was done to a convicted felon after the 1948 Act, it was held in *R. v. Brook* that the order made was improper. The correct procedure if it was desired to send the offender immediately to prison rather than give him time for payment would have been to impose a fine and sentence in default of payment. The sentence would then begin to run at once, but the prisoner could obtain his discharge at any time by paying the fine.

In *Treasury v. Harris and Another*⁸ an action was brought by the Treasury pursuant to the Crown Proceedings Act, 1947, to recover against the administrators of a deceased prisoner the sum of £1,000, being the amount of four fines of £250 each imposed upon the prisoner when he was found guilty of felonious receiving by the Recorder at Southampton Quarter Sessions. He had been sentenced to two years' imprisonment on each of four counts, and a fine of £250 on each count. The fines were of course cumulative, and in default of payment there was to be a further sentence of four months in respect of each fine. The prisoner died after serving less than eight months of his two years' sentence. The Treasury claimed that the fines became debts of record owing by the deceased to the Crown, and that upon his decease or at the end of the two years these debts became due and payable. The defendants denied liability, and contended among other things that the order made in respect of the terms of imprisonment in default of payment of the fines provided in effect that the prisoner was to have time for payment until the expiration of the two years' sentence, and by reason of his earlier death that date had never arrived. Hence, the powers of recovery of the fines were in abeyance.

⁷ [1949] 2 K.B. 138, at 141.

⁸ See n. 6.

Lord Goddard C.J. held that the fines were debts of record payable at once, so that the liability had already accrued at the date of death. He found strong authority in an old case concerning misdemeanours, *R. v. Woolf*,⁹ where three judges had been unanimous that this was the legal position concerning fines. Save that this case concerned a misdemeanour not a felony and the prisoner was not dead, the position was almost identical with that in *Treasury v. Harris*. Woolf had been sent to prison for two years, ordered to pay a fine of £10,000, and to be further imprisoned until that fine was paid. A *levari facias*¹⁰ having issued against him out of the Court of King's Bench, he brought an action to challenge this, and it was held that the process was perfectly proper, although the defendant had not yet served his two years. Abbott C.J. said that the Crown was "entitled to levy for its debts by an united process against the body, land, and goods of its debtors."¹¹ Bayley J. said that by the judgment the debt became "a debt to the King, of record: and it is payable to the King instanter."¹² Best J. agreed.¹³

Possibly because of this decision the Levy of Fines Act was passed in 1822 to provide for "the more speedy return and levying of fines, penalties, and forfeitures, and recognizances estreated." That Act is referred to in the Criminal Justice Act, 1948, as if it were still operative, but Lord Goddard's view, expressed in *R. v. Brook*, and again in the present case, is that its provisions have been superseded by the procedure prescribed by the Act of 1948. Various courses are now open to a court desiring to impose a fine. Under section 14 (1) they can give time for payment, allow payment by instalments, and fix a term of imprisonment "which the offender is to undergo if any sum which he is liable to pay is not duly paid or recovered." The ordinary steps which the Crown would take to recover the money would be by means of a writ, and in Lord Goddard's view "whether it be of *levari facias* or *feri facias* matters not." The important point is that the fine is a debt to the Crown, and on these facts it remained unpaid. There was nothing in section 15, which he characterised as "procedural," to indicate that if a defendant has assets, the sheriff may not levy execution against them. Section 15 makes provision for many contingencies, but the death of the offender is not one of them. In a civil action the Rules of Court enable an application to be made to the court for leave to issue execution against the dead man's

⁹ (1819) 2 B. & Ald. 609; 106 E.R. 488.

¹⁰ The writ of *levari facias* appears to have been the equivalent of the *feri facias*, as Lord Goddard remarked. In *The King v. Shackell* (1825) 1 M'Cle. & Yo. 514; 148 E.R. 516, it is said, at p. 524, that it was referred to as the summons of the green wax, "so called from the colour of the wax with which it was sealed." It was "the same as the summons of the pipe," which is described as having been "in the nature of *feri facias*."

¹¹ *Loc. cit.*, p. 610.

¹² *Ibid.*, p. 611.

¹³ *Ibid.*, p. 613.

assets, which would be in the hands of his personal representatives. In a criminal case Lord Goddard saw no reason why the Crown should not sue for the amount of a fine in similar circumstances.

So much for the legal aspects of the decision. Turning to the wider aspects of the case once more, Lord Goddard said that the courts were perfectly entitled not only to punish the offender "but take steps to see that he should not benefit by keeping the results of the crime; and I think that it is equally important (he added) that, if a man is dead, his estate should not benefit by the proceeds of the crime."¹⁴ The logic and justice of this is impeccable, and yet the question remains whether all fines fall in the category described. Many, perhaps the majority, are intended as punishment with a view to deterrence or reform. It cannot be denied that there is some danger of transferring the punishment to the survivors and inflicting hardship. Perhaps the solution lies in the good sense with which the Crown will undoubtedly approach such cases.

Finally, it is interesting to note that Lord Goddard anticipated the decision in *Treasury v. Harris* in an *obiter dictum* in *R. v. Rowe*,¹⁵ where he said: "Supposing, as sometimes happens, a man is convicted on indictment and fined £500; the money has to be paid, and the Crown can recover that money whether he is alive or dead, for it can recover against his estate. . . ."¹⁶ The case concerned a widow who wished to continue the appeal against her husband's conviction which he had launched shortly before his death. It was held that she had no pecuniary interest which entitled her to proceed, unlike the executors in *Hodgson v. Lake-man*.¹⁷ Her desire to clear her husband's name could not be gratified. If he had been fined, the matter would have been different, for then she might have been heard for the benefit of the estate. Clearly prisoners who die are capable of posing as many problems as those who live.

J. E. HALL WILLIAMS.

UNCOMMON LAW

*Taczanowska (or se. Roth) v. Taczanowski*¹ is a hard case.

There is, at first glance, something very odd about applying even a genuine rule of the English common law to the requirements of form in a marriage celebrated between two persons of Polish nationality by a Polish army chaplain in Italy. It is,

¹⁴ At p. 19.

¹⁵ [1955] 1 Q.B. 573.

¹⁶ At p. 575.

¹⁷ [1949] 1 K.B. 15.

¹ [1957] 3 W.L.R. 141; [1957] 2 All E.R. 563, C.A., of Hodson, Parker and Ormerod L.J.J., reversing Karminski J. at [1956] 3 W.L.R. 935; [1956] 3 All E.R. 457.

in fact, well known that the rule laid down by the House of Lords in *R. v. Millis*² as to the form of marriage at common law, is as historically spurious³ as it is inappropriate to any realistic criterion of a valid marriage.⁴ In the conflict of laws, it is also a strange and dubious doctrine that the *forum* of a suit for nullity of marriage is at liberty to apply its own domestic law to the form of a marriage celebrated by foreigners abroad, in circumstances in which the maxim *locus regit actum* is inappropriate.

The circumstances of the case were so unusual that they just failed to come within the terms of the various acknowledged exceptions to the general principle of *locus regit actum*, and it is difficult to avoid the conclusion that what the Court of Appeal really applied was something like the equity of a statute,⁵ but unfortunately it did so under the colour of the common law rule of the *forum*. On July 16, 1946, an officer of the Polish 2nd Corps, part of the Polish forces then in occupation of Italy with the Allied Forces, went through a ceremony of marriage in Rome with a woman of Polish nationality living there as a civilian refugee. The ceremony was performed by a Roman Catholic priest serving as a Polish army chaplain. There was no doubt that both parties intended to contract and at the time believed that they had contracted a valid marriage. They cohabited until 1950, and a child was born to them in 1947. In 1956 the wife applied to the High Court for a declaration of nullity on the ground of defect of form in the ceremony.

It was clear that the requirements as to form of marriage of the law of Italy had not been complied with in two particulars; in the first place, the officiating priest had failed to read to the parties certain articles of the Italian civil code, and secondly, the ceremony was not registered in the civil register of marriage, as required by Italian law. The law of Italy would, however, regard the ceremony as formally valid if it had complied with the formalities laid down by the national law of both the parties. Until the end of 1945, Polish army chaplains had authority by Polish law to solemnise legal marriages of military persons, but this power was then withdrawn from them by the Lublin Government, which had been placed in power in that country, and was recognised by His Majesty's Government in July, 1945. As from January 1, 1946, it was provided that only a marriage contracted before an official

² (1844) 10 Cl. & Fin. 534.

³ See *Beamish v. Beamish*, 9 H.L.C. 274; 2 Pollock & Maitland, Ch. VII, p. 370; J. Jackson, *The Formation and Annulment of Marriage*, pp. 12, *et al.*

⁴ The rule that a marriage is valid at common law if celebrated before an episcopally ordained clergyman, with its emphasis upon an episcopal hierarchy, results in the validation of the marriages of episcopalians but not those of many Protestant sects. It is strange that Hodson L.J. should have prefaced his statement of the rule by remarking: "The common law conception of marriage knows no distinction of race or nationality." [1957] 3 W.L.R. 151.

⁵ *viz.*, The Foreign Marriage Act, 1892, as amended by the Foreign Marriage Act, 1947, s. 2.

of civil status would be valid in Poland, and two days before the marriage ceremony took place, the Polish Ministry for Foreign Affairs had issued a note stating that the Polish forces abroad could no longer be considered units of the Polish army. Although Karminski J. thought it probable ⁶ that at the time of the ceremony, the change in the law was unknown to the chaplains to the Polish army, both he and the members of the Court of Appeal agreed that, despite ingenious arguments to the contrary, the ceremony was undoubtedly invalid by Polish law as it existed when the ceremony took place.

There remained the question of whether any provisions of English law could be invoked to validate the marriage, defective in form as it was by the laws of both the place where it was performed and of the nationality of the two persons concerned. Again, at first instance and on appeal, the courts agreed that English law has always considered that the position of members of a military force in occupation of a foreign State may need special consideration ⁷ but the difficulty was to find a provision that would fit the peculiar facts of this case. Both the Allied Forces Act, 1940, and the Polish Resettlement Act, 1947, were held to be confined to acts within the United Kingdom, and were therefore inapplicable to the celebration of marriages in Italy.

As to the Foreign Marriage Act, 1892, s. 22,⁸ there was again agreement at first instance and on appeal that the operation of this section is not confined to spouses of whom one is a British subject.⁹ Equally clearly, the section is confined to marriages solemnised by "a chaplain . . . officiating under the orders of the commanding officer of a British Army serving abroad." As the Polish 2nd Corps was an independent command, the chaplain who performed the ceremony between the parties could not be regarded as officiating under the orders of the commanding officer of a British army serving abroad. The drafters of the Act plainly had not envisaged the situation of independent allied forces abandoned by the law and government of their own countries, and compelled to resort to the English courts for clarification of their personal status. Karminski J. found the difficulty insuperable, and held the marriage invalid, but the Court of Appeal calling in aid a South Australian decision on different facts,¹⁰ decided that the common law could be invoked to fill the gap.

O. M. STONE.

⁶ [1956] 3 W.L.R. 941.

⁷ [1956] 3 W.L.R. 944-945; [1957] 3 W.L.R. 151.

⁸ As amended by the Foreign Marriage Act, 1947, s. 2.

⁹ Hodson L.J. at [1957] 3 W.L.R. 146, approving Dicey, *Conflict of Laws*, 2nd ed., p. 623.

¹⁰ *Savenis v. Savenis & Szmeck* [1950] S.A.S.R. 309.

CONSIGNEE'S RIGHT TO ARREST THE SHIP

*Schwartz & Co. v. St. Elefterio*¹ is an early case decided in accordance with the International Convention relating to the Arrest of Seagoing Ships, concluded in Brussels in 1952. The Convention, which was ratified by the Administration of Justice Act, 1956, brought about an important change of English law. As Willmer J. pointed out, a creditor of one ship can now arrest another ship belonging to the same owner. In *The Beldis*,² apparently the only reported case on this point, it was held that a maritime lien—as any lien in possession—attached only to the specific ship in respect of which the cause of action arose.

This so-called right to arrest a sister ship was, however, not in issue in *The Elefterio*. What happened there was that the charterers of the vessel shipped goods which they had sold to the plaintiffs. The latter resold the goods, but the purchasers later rejected the bills of lading on the ground that they were wrongly dated. The plaintiffs, to cover themselves against liability for breach of their contract with the purchasers, arrested the ship, although they had no contract with its owners, apparently basing their action on the fact that the master's misdating of the bills of lading was fraudulent, an act for which his employers, the owners, were vicariously liable.

In these preliminary proceedings the owners asked for the writ to be set aside, arguing that the plaintiffs had no cause of action against them and that section 3 of the Administration of Justice Act gave a right to proceed *in rem* only to persons having an action *in personam*. But the learned judge held that the arrest must stay, since it had been effected in respect of a claim "arising out of any agreement relating to the carriage of goods in a ship" (s. 1 (1) (h) of the Act), and that these words were wide enough to cover an action in tort. He also held that the plaintiffs might well prove their case when the action was tried. The very argument of the defendants indicated the complexity of the dispute, and the plaintiffs were entitled to security. The defendants' remedy at this stage was to furnish bail so as to regain the use of their vessel.

The learned judge made an interesting observation on the ultimate costs of the cause. He conceded that the defendants, even if successful, might not recover all the costs of furnishing bail. He added, however, that in this they were no worse off than many a successful defendant in other proceedings where the plaintiff was legally aided. Such loss was "one of the incidents of litigation which . . . parties have to accept in modern conditions."

The case decides no new point; indeed the decision would have been the same under the old law, section 22 of the Judicature Act,

¹ [1957] 2 W.L.R. 935; [1957] 2 All E.R. 374.

² [1936] P. 51.

1925. On the other hand, it draws attention to a possible remedy of a purchaser of goods which would not be likely to occur to most legal advisers. If it is possible to start proceedings *in rem* by arresting a ship it solves not only the problem of jurisdiction over a foreign defendant but also that of enforcing any judgment obtained against him.

O. C. GILES.

THE PUBLIC NATURE OF DOMESTIC LIABILITIES

AN effective, if somewhat devious, method of reforming family law seems to have resulted from the efficient relief of poverty out of the public purse. Once disbursements to those in need have been made from public funds, it seems that the Establishment (which for this purpose includes the judiciary) can be relied upon to ensure recovery from those legally responsible, even by methods only recently disapproved by a Royal Commission.

In 1948, national assistance became effective for the first time because the body administering it was more interested in relieving poverty than in dispensing shame. The result was an increasing tendency for wives left without support by their husbands to apply to the National Assistance Board for maintenance for themselves and their children. In a series of judicial decisions,¹ this body has in turn successfully established its right to recover from the husband (whom it was in a much better position to trace), any disbursements made for the maintenance of his wife, provided that she was not guilty of a matrimonial offence such as adultery² or desertion.³

The machinery was, however, cumbersome, and once the liability and corresponding interest of the public purse had been established, there were obvious advantages in improving the wife's prospects of recovery direct from the husband without the intervention of the National Assistance Board. The circular issued by the Registrar of the Divorce Registry as a *Practice Direction* (Disclosure of Addresses),⁴ is an attempt to strengthen the wife's direct claims on her husband for maintenance by helping her to trace him when he disappears.

The circular provides that the address of a husband, if contained in social security records held centrally by Government Departments (which in the majority of cases means the Ministry of Pensions and National Insurance) may be disclosed to the court for the assistance of a wife seeking to obtain or enforce an order for alimony or maintenance for herself or the children. This seems a logical development of the concept of life-long security;

¹ *N.A.B. v. Prisk* [1954] 1 W.L.R. 443, D.C.; *Stopher v. N.A.B.* [1955] 1 Q.B. 486; *N.A.B. v. Parkes* [1955] 2 Q.B. 506.

² See [1955] 2 Q.B. 506.

³ *N.A.B. v. Wilkinson* [1952] 2 Q.B. 648.

⁴ [1957] 1 W.L.R. 810; see also [1957] 2 All E.R. 504.

availability for insurance and pension benefits should carry with it also availability to answer legal claims for maintenance. It would also seem to be beyond dispute that if a husband is to remain legally liable for the maintenance of his wife and children, there is everything to be said for making that liability effective. Nothing is more destructive of the law's authority than inability to enforce it.

It is made quite clear that the new procedure is to be used only for obtaining or enforcing maintenance, and nothing in the circular is to affect the service of petitions which do not contain applications for maintenance. Requests for the information must be made officially by the registrar or district registrar, who is required first to satisfy himself that the wife has already made every reasonable effort (short of employing inquiry agents) to discover the whereabouts of her husband. If possible, the Ministry will then supply the husband's address to the registrar, and he in turn will pass it on to the wife's solicitor or, in proper cases, to the wife herself if she is acting in person, against an undertaking to use it only for the purpose of the proceedings.

It is in applying this last provision, that in proper cases the husband's address can be made available to the wife in person, that considerable care and discretion will be called for. There is, after all, a great deal of difference between supplying a man's address to a court official, so that his legal liabilities can be enforced, and giving it to his aggrieved and possibly vindictive wife. Such an extension of the new procedure appears to be one more unfortunate result of the close identification in the law between the wife and the children as far as maintenance is concerned, and the rule that only the wife can recover maintenance for the children in civil proceedings from her husband.

Unfortunately the members of the Royal Commission on Marriage and Divorce did not confine themselves to this narrow ground of objection, but rejected the whole notion of assisting a wife to trace the husband who had abandoned her and her children, when they declared⁵: "We are satisfied that it would be wrong to require Government Departments to disclose the husband's address, whether to an officer of the court or to the wife. Against the right of a wife to maintenance must be balanced the right of the husband to have his privacy respected; in our view the latter must prevail." This comment again shows an identification between wife and child as regards maintenance; the Royal Commission was content to subordinate by implication the dependent child's right to maintenance to the parent's right to privacy. In rejecting likewise a proposal that magistrates should have power to issue a warrant to bring a husband before the court on a wife's application for a maintenance order, the Royal Commission commented⁶: "It is a very serious matter to arrest a man." It might have added,

⁵ Cmd. 9678, p. 296, para. 1148.

⁶ *Ibid.*

but did not, that it is a very serious matter to abandon a dependent child, and that in any event the law should be enforced, or if unenforceable, should be amended.

The very detailed information required to enable the Ministry to identify the husband includes his National Insurance number, date of birth and, if he is a war pensioner, his war pension number and service particulars. This seems to call for some special training for girls on the significance of official numbers, and how they can most effectively be memorised.

O. M. STONE.

CONTRACTS TO MAKE WILLS, AND THE SCOPE OF SECTION 24, WILLS
ACT, 1837

It is not very often that the Court of Appeal is required to consider a new problem concerning the equitable doctrine of election, but it was asked to do so in *Re Edwards (decd.)*.¹ Here a testatrix had directed in her will that a house she owned and in which she lived, together with the residue of her property real and personal, should be divided between seven named persons. Some months later, she made a binding contract to leave the house by will to her sister, one of these seven persons, and in fact she made an invalid attempt so to devise it. Specific performance of the contract to convey the house to the sister was granted against the executors, and the other six of the seven persons to whom the residue of the property had been left then claimed, successfully at first instance,² that the sister was put to her election between taking the house under the contract and taking one seventh part of the testatrix's residuary property, and by obtaining an order for specific performance of the contract to convey, must be deemed to have elected to take against the will, and had therefore lost her share in the residue of the property.

The main consideration for this decision of Upjohn J. was that, by section 24 of the Wills Act, 1837, a will is deemed to speak from date of death, and that therefore the testatrix must be deemed to have intended, at the time of her death, that the house should be considered as part of her residuary property, for division among seven persons; the sister had elected against the will, and could not claim also her seventh share in the residue of the testatrix's property. Similarly, the principal ground on which the decision was reversed in the Court of Appeal was that the court was not bound, by virtue of section 24 of the Wills Act, 1837, to read the will of the testatrix simply with reference to the facts as they existed at the date of the death; regard must also be had to any disposition of the property effected after the making of the will. In this case, the fact that, after making her will, the testatrix had

¹ [1957] 3 W.L.R. 131; [1957] 2 All E.R. 495, C.A.

² [1956] 3 W.L.R. 771; [1956] 3 All E.R. 526.

entered into a binding contract to dispose of the house in a certain way at her death meant that the gift of that house to the seven persons named in her will had been adeemed, and that therefore no question of election arose. Jenkins L.J. pointed out that if any investigation of circumstances at the date of the making of the will, or occurrences between the making of the will and the date of death were precluded, it would be difficult to see how any case of ademption could ever be made out. Both Jenkins and Romer L.J.J. stressed that, if the doctrine of election were to be applied in this case, it would be applicable also if, in similar circumstances, the testatrix had disposed of property for its full monetary value to one of the residuary legatees. So to hold would mean that the remaining residuary legatees would be enriched by the purchase price, which would have gone to swell the residuary estate.

The doctrine of election is based on the principle that a beneficiary is not permitted to frustrate the intention of the testator by accepting the benefits given to him by the will without accepting also the detriment indicated by the testator. In this case there could be no question of frustrating the intention of the testatrix, who had made her intention to devise the house to her sister quite clear, though unfortunately of no testamentary effect.

Another aspect of the case that is not without interest, although it receives only incidental attention in the reports of the case,³ is the decision of Danckwerts J. that the contract to devise the house to the beneficiary was valid and binding. The consideration for this oral contract was that the sister should give up the lease of the house in which she was living, and come to live with and look after the testatrix until her death, when the house occupied by the testatrix would be devised to her. In general it is fair to say that the English courts are reluctant to hold that those who promise testamentary favours in return for present services intended to create a legal binding contract, and rarely grant specific performance of such contracts.⁴ Some more information on the strength of the evidence for this particular contract would have been of value. It is, of course, notorious that elderly people with property frequently obtain very considerable services in return for promises to leave property at death. Without good evidence of the intention to create legal obligations and the precise terms agreed, there is clearly room for unmerited claims by the survivor. The past tendency of the English courts to find such alleged contracts not proved, may also have had the salutary result of making people less ready to enter into understandings of this nature. The tendency is otherwise in the United States, where there is a great

³ There is no evidence in the report of the nature of the evidence of the contract. Presumably the unattested codicil attempting to devise the house to the sister was sufficient memorandum in writing to satisfy the Law of Property Act, 1925, s. 40.

⁴ The case of *Maddison v. Alderson* (1883) 8 App.Cas. 467 stands as an awful warning of the difficulties likely to be encountered.

body of case law on contracts of this nature, and if the order for specific performance of this contract is a portent, it may be that we shall see a development of contracts to make wills comparable with that to be found on the other side of the Atlantic.

O. M. STONE.

BILL OF LADING CLAUSE STRUCK OUT OF CHARTERPARTY

IN *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.*,¹ the Court of Appeal rejected a "paramount" clause, which the parties had incorporated in a charterparty, as "insensible," but it granted leave to appeal to the House of Lords. Denning L.J. (as he then was) drew attention to the fact that the paramount clause was originally drafted to make bills of lading drafted for non-Hague Rules shipments comply with the Hague Rules, in other words, to make the liability of shipowners more strict. In the case before the court the owners had pleaded the clause to escape liability, but they failed.

It happened in this way. A tanker was chartered for as many consecutive voyages throughout the world as it could manage in eighteen months. The owners exercised due diligence in selecting a competent engine-room staff, but the latter was in fact so incompetent as to make the ship unseaworthy, and during the currency of the charterparty the charterers lost the use of the vessel for 106 days. They accordingly claimed £80,000 damages to compensate them for the loss of freight.

The charterparty contained the usual condition that the vessel was "tight, staunch and strong . . . and (was) to be maintained in such condition," and so the diligence exercised in selecting the engine-room staff did not help the owners. Nor could they derive comfort from another clause, excepting liability for "perils of the sea" or "accidents of navigation," for neither cause was responsible for the loss suffered by the charterers.

The owners were accordingly thrown back on the paramount clause which, by introducing the Hague Rules, protected owners who had been diligent in making the ship seaworthy. This paramount clause was typed and pinned to the printed charterparty form. It started with the words "this bill of lading," incorporated the Carriage of Goods by Sea Act of the U.S.A. (which expressly excludes charterparties from its scope), and declared any term repugnant to the Act void.

Denning L.J. tried, "without relying on the phantom guide of the intention of the parties"—for they had obviously not considered its implications—to give a meaning to the clause, but he despaired. To establish harmony between the paramount clause and the body of the document the court would have to proceed as follows: it would have to strike out the words "this bill of lading,"

¹ [1957] 2 W.L.R. 968; [1957] 2 All E.R. 311.

the section of the U.S. Act excluding applicability to charterparties, and the reference in the Act to contracts for carriage to or from the U.S.A., the last clause because the charterparty was world-wide. Even such drastic surgery would not remove all difficulties, for the Act refers to the carriage of goods, and this means that the paramount clause would apply only to cargo-carrying voyages performed under the continuous charter; Devlin J. in the court below had in fact accepted that conclusion. Finally, however, the damage or loss envisaged by the Act is loss or damage to goods carried on board a ship, while the loss in the case before the court was loss of freight.

All three judges refused to effect so many alterations of the document, since to do so would amount not to construing, but to drafting, an entirely new clause for the parties. In this case, in particular, Denning L.J. thought that the judges would probably differ among themselves as to what was reasonable.

This case can hardly be said to decide a new point of principle, but it furnishes an interesting application of the canon of construction according to which contracts should be interpreted *ut res magis valeat quam pereat*. The overall contract was held to be valid, but the clause in dispute defied all attempts to give a meaning to it. The owners rightly did not ask the court to imply a term limiting their liability; nothing so drastic was necessary to give business efficacy to a contract, since this contract made perfect sense without any addition to the printed form.

The case is also of interest for another reason. It has long been the law that where in a standard contract written or typed words are inconsistent with the printed form the written or typed addition shall prevail "inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning".² In the *Adamastos* case, however, it was obvious that the parties had not applied their minds to the implications of the typed words, and these were accordingly rejected in favour of the printed form.

Finally, the case provides a useful contrast to *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.*,³ where the Judicial Committee considered a reinsurance contract which had been grafted on an ordinary fire insurance policy that contained a clause binding the assured to commence an action within twelve months of the fire. The committee struck out that clause as incompatible with the purpose of the reinsurance. In the *Adamastos* case, on the other hand, it was the additional clause that was struck out. In both instances the contract contained clauses that were incompatible with the type of contract that the parties had concluded.

O. C. GILES.

² Lord Ellenborough in *Robertson v. French* (1803) 4 East 136.

³ [1907] A.C. 59.

REVIEWS

TRIAL BY JURY. By THE HON. SIR PATRICK DEVLIN. (The Hamlyn Lectures. Eighth series.) [London: Stevens & Sons, Ltd. viii and 179 pp. 1956. 15s. net.]

For good and sufficient reason those who hold judicial office in this country tend to confine their efforts to the task of applying the law in court, before the eyes of all, and are less ready than their foreign colleagues to expound it also in theoretical or critical writings. Yet there are certain broad aspects of the law—and procedure must rank high among them—upon which judges could speak with authority and insight gained from daily experience on the Bench which is denied to others. This is what gives special value and significance to the fact that Devlin J. chose for last year's Hamlyn Lectures the subject of *Trial by Jury*, which has of late become something of a controversial one.

Not that Sir Patrick intends to throw the weight of his argument decisively upon either side in this controversy. He points out that there is no modern English work either on the history of trial by jury or on its present-day mechanics, and in these Lectures, which are addressed by their terms "to the Common People of the United Kingdom," he simply sets out to supply this unfortunate gap. *Trial by Jury* is thus primarily an exposition of the working of present-day English trial seen—if not from the (closely guarded) jury room—from the vantage point of the Bench, and if Sir Patrick Devlin in the end comes out unequivocally with his own opinion, he does so in a strictly judicial spirit, adjudicating, as befits his office, upon the broad merits of a case upon which he himself has no doubts.

The first three of these six Lectures are devoted, consecutively, to the (historical) Origin of the Jury, to the Composition of the Jury and to the Rules which govern it in the discharge of its judicial functions. It is upon foundations thus firmly laid that the lecturer comes to the crux of the matter: the question how it is possible to enforce the law successfully on the strength of the views of twelve men and women, selected at random and unaccustomed to any serious intellectual exercise, who give their verdict in one word and without reason. Sir Patrick's plain answer is that it isn't; "the reality of trial by jury," he says, "consists of a *combination* of judge and jury." It is in the exact definition of the relationship between the two such as it has grown in the practice of English courts, in the description of their subtle interplay and balance, that Devlin J.'s Lectures, though designed in the first place for laymen, reveal an originality of approach which can perhaps be fully appreciated only by lawyers.

The usual generalisation that the facts are for the jury and the law for the judge is here dismissed as "a deceptive brocard" which "misses the reality" of jury trial; at another point it is rejected as "quite misleading." The jury, it is true, can in theory approach the facts in any way they like, "but neither their constitution nor the trial process is designed to encourage them to do so." The central portion of Devlin J.'s Lectures, then, and its most weighty one, is devoted to what he calls "The Control of the Jury," the extensive limitations upon the jury's function as judges of fact. The control which the judge exercises at the trial over the jury is both formal and informal. "The effect of every rule of law is to limit the power of the jury," says the author, but "there are also informal ways in which the judge influences and shapes the verdict."

Only from a member of the Bench can we get such a clear picture, the inside story, so to speak, of the various means by which "the judge controls the mind of the jury." Not the least of them is the high prestige enjoyed by judicial office. As a net result, the domain of the jury is far less great than is popularly conceived and, as the author insists by giving examples (like *Holmes v. D.P.P.* [1946] A.C. 588) even in our days "the courts are still prepared to encroach on (it) for practical reasons." There is no likelihood nowadays of the jury defying the law; "I do not suppose," says Devlin J., "that any judge sitting today has ever had to consider what he should do if a jury returned a verdict contrary to his direction." As for advice tactfully but unequivocally given in the summing-up, the judge has every reason to expect that he will be followed, for his influence partakes of "guidance as well as of commandment."

Is, then, Devlin J. to be numbered among those who are inclined to consider jury trial an outmoded form of procedure? By no means. He acknowledges of course that trial by jury in civil matters has seriously declined of late, and gives valuable and hitherto unpublished figures to show that this decline (where jury trial is available upon application under the Administration of Justice Act, 1933) is due to the fact that juries are not being asked for. The reason, according to Sir Patrick, is "the need and desire to confine fluctuations in awards and verdicts within conventional limits (of which only the judge knows what they are)." In any case which runs more or less to pattern it is obviously far easier to predict the result of a trial before the judge alone than before a jury, especially in the matter of damages.

On the other hand, civil cases with exceptional features or a sharp conflict on the facts, "where there is going to be hard swearing on both sides" (the author speaks of "wholesale perjury" at another point), are unpredictable anyway and these often fall into the limited categories in which jury trial is given as of right. Indeed—and this applies to criminal matters as well—his experience leads Devlin J. to the view that, "if judges are by training better equipped for the drawing of inferences and reaching sound conclusions upon a mass of facts," they are not as good as the jury in deciding upon credibility: "I think it must be agreed," he writes, "that there are some determinations in which twelve minds are better than one, and most people would accept that the determination whether a witness is telling the truth is one of them." No doubt this is one of the reasons why courts consisting of puisne judges are no longer in favour on the Continent in criminal matters or even in civil litigation of any importance. Continental lawyers might not accept without qualification Devlin J.'s statement that "no way has yet been found of gaining the superiority of the jury as the judges of the primary facts without being saddled with their inferiority as judges of the secondary." The French might consider that their practice in criminal matters, where the jury jointly deliberates (and votes) *with* the professional judges both on the question of guilt and punishment (rather along the lines of, say, a Quarter Sessions Appeals Committee), goes some way towards a solution, and similar claims have been made for the Assessor system as practised today in Italy, W. Germany and elsewhere. What cannot be denied is that the particular way in which "the coalition of the lay mind with the legal" has come to be established in the English system has gradually revealed certain inherent incidental disadvantages, among which the unduly technical and complicated rules of the law of evidence are certainly conspicuous.

Ultimately, indeed, the chief argument in favour of jury trial, as against all other alternatives which have been, or are being, mooted, does not derive from considerations of judicial expediency or efficiency. Devlin J.'s unhesitating adherence to jury trial rests fundamentally, as it must do, on grounds of broader import to the whole administration of the law and the constitution. It is founded on the belief that even today the jury offers

a vital safeguard against autocratic rule, dictatorship or tyranny of the State. In the first place he holds that "the existence of trial by jury helps to ensure the independence and quality of the judges," since in the past, and presumably in the future, compliant judges are easier come by than amenable juries. What is more, the speaker gives it as his view that there is "no real check today" upon the power of the executive other than the knowledge that, "in dealing with the liberty of the subject, it must not do anything which would seriously disturb the conscience of the average Member of Parliament or of the average jurymen."

Jury trial helps to ensure that the law, or certainly at least the criminal law, and its administration will conform to the ordinary man's idea of what is fair and just. In times of gradual and peaceful constitutional evolution this may be self-understood. But he would be a bold man who would dare to scorn Devlin J.'s description of the jury as a "Lamp of Freedom" on the mere ground that, at the moment when he delivered his lucid Hamlyn Lectures, the privileges which in law and custom we enjoy seem so firmly established that we are inclined to take them for granted.

H. A. HAMMELMANN.

ROMAN FOUNDATIONS OF MODERN LAW. By H. F. JOLOWICZ, LL.D., D.C.L., Late Regius Professor of Civil Law in the University of Oxford. [Oxford: Clarendon Press. 1957. xx, 206 and (index) 11 pp. 35s. net.]

It had been evident for some time before the death of Professor Jolowicz that he regarded the *Corpus Juris* less and less as a *terminus ad quem* and more and more as a *terminus a quo*. In an age of greater leisure the historian and the philologist happily plied their excursion trains over the well-worn routes between the classical period and the codification of Justinian, rattling noisily over the points at innumerable junctions. But the modern utilitarianism has signalled the need for an examination of the extensions of Roman law into the legal systems of the present day. Jolowicz always appeared to be among those who realised that the *Corpus Juris*—indeed in many cases the Institutes alone—had been tending to become a dead end for the student of Roman law. All too frequently the student arrived at his destination only to be greeted with the cry of "All change here!" As if the power of Roman law had been finally exhausted in the sixth century of the Christian era! As if new drivers had not taken over—some perhaps very much later—and as if new fires had not been kindled to set the engine running on lines more and more remote from its first halting-places!

So this posthumous publication begins: "For our present purpose we have to start from the *Corpus Juris* as from something given." And in an extract from the author's notes appearing in the Preface we read: "Explain also how the modern teaching of Roman law from a purely historical point of view has militated against the understanding of Continental systems, whereas previously it was possible to refer to "civil law" generally in comparison with English law, either favourably or unfavourably, and, where found convenient, to borrow principles from it." It is a part of our regret at Jolowicz's untimely death that he was able only to begin the fulfilment of the important task he had set himself. About the beginning of the classical period there lived a Rabbi who said that even if a man realises that he may not be able to complete a task he is not free to desist from it. Some such reflection may have been in the mind of Jolowicz. To those who have helped to ensure that this incomplete work should not be lost to future generations we must be eternally grateful.

About half of the book is devoted to the sources of law; and since its

starting point is a legislative enactment, what more appropriate than an early chapter on the interpretation of statutes? Then to an examination of custom, partly because the revived Roman law came into contact with customary systems of law and partly because of the relevance of the relation between custom and statute. But Roman law came to be received in different places and at different times; and perhaps it was this fact that prompted the next two chapters on the territorial and temporal limits of the application of legal rules. Thereafter three chapters follow the familiar *Institutes* pattern of the divisions of the law, but with an eye to the value of such divisions and to the extent to which they are followed in modern codes. The author intended to leave procedure out of this part of his work; but a consideration of substantive rights in his treatment of the divisions of the law almost inevitably led him to introduce a chapter on the effect of procedure on substantive rights—including a useful survey of the *res judicata* principles.

The second half of the book deals with the law of persons and family law. On Guardianship the Preface could give only the author's synopsis. Jolowicz had made it clear that in the content of his book much would depend on what happened to have interested him. That would be sufficient reason for his fascinating "side-shows" on such matters as the moment when a person is born and the method of computing time for the purpose of ascertaining when a person reaches an age of capacity. More substantial fare is to be found in a short and simple treatment of incapacities, a dissection of the Roman view of corporate personality, an excellent discussion of matrimonial property, but an all-too-brief account (at the end of the book) of the duty to support relatives. The chapter on marriage is particularly valuable. After considering the original Roman system the author goes on to show that the concept of marriage in many modern systems is based on Christian ideas "which had penetrated only to a limited extent into the *Corpus Juris*." Nevertheless traces of Roman ideas are still to be found.

This is more than a book on Roman law. There is much in it of Canon law and of modern principles of English, French, German and Swiss law. Jolowicz traces the Roman line as far as it goes. He indicates clearly the point of divergence, but rarely does he suggest a reason for the divergence. Much of his writing—and notably his *Historical Introduction to the Study of Roman Law*—bears witness to his interest in history. But pre-eminently Jolowicz was an adept in the analysis of legal phenomena. His skill as a Romanist in no way outshone his mastery of jurisprudential ideas. Indeed each contributed to the other, and that is abundantly clear in every part of this book. His capacity for simplified lucid expression became greater as the years extended the range of his knowledge, and even more than before that is apparent in this last work. It is as if to him the essence of human understanding was that he should be clearly understood.

RAPHAEL POWELL.

THE CODE NAPOLÉON AND THE COMMON LAW WORLD. Editor, BERNARD SCHWARTZ. [New York: New York University Press. 1956. x + 438 pp. \$12.25.]

THERE can be no common lawyer who has not heard of the Code Napoléon, the French Civil Code, though there may be many to whom it means little more than the regularly cited exemplar of "the continental approach" in lectures on the sources of law and jurisprudence. The year 1954 saw the 150th anniversary of the promulgation of the Code and the New York University Institute of Comparative Law had the felicitous idea of celebrating the event with a conference of scholars, American and foreign, on the theme, "The Code Napoléon and the Common Law World." The volume under review is a collection of the papers delivered at this conference and provides an excellent

survey of many aspects of the Code which will be of interest and value to the common lawyer, doubly so to one interested in comparative law. It must be said also, however, that—as seems inevitable in works of such a genesis—the contents vary considerably in length, quality and relevance to the central theme. More accurately, the book consists of essays on the Code together with papers on topics of comparative content and on codification at large, divers and diverse—to the reviewer, perhaps the most fascinating essay was a discussion of the problems facing the codifier in Israel.

The Code was certainly a consequence of the Revolution: but it can scarce be regarded as a work of revolution. Not the least source of its strength is the judicious blending, in its content, of the old and the new. In the main, it is fair to say that, where it was relatively uniform, the drafters were not concerned to change the old law, unless policy required it: and, in fact, much of the law was far more generally uniform before the drafting of the Code than might be popularly supposed—the law of obligations, by and large, was the received law of Rome; and, even in other fields, the great authority of, especially, Pothier had been given to finding common ground between the various “customs,” while there was also some general legislation, notably the great *Ordonnances* of Daguesseau. To their eternal credit, the drafters took full account of this. Hence, for instance, the egalitarian influence of the Revolution which produced in the Code the abolition of feudal (and therefore “class”) institutions and incidents, the abolition of primogeniture, the introduction of general ability to make wills, and freedom of ownership and exchange of property stopped short of intra-familial family law, where the husband retained the dominant position that had always been his; the law of obligations was virtually unaffected in substance by the Code; a conspicuous example of the spirit of compromise is the regulation of matrimonial property—the Code provides a general form of community which applies in the absence of other agreement of the parties; and the alternatives open to selection by such agreement in effect preserve previous customary régimes. André Tunc illustrates these contrasting but combined features of the legislation in his panoramic survey, “The Grand Outlines of the Code.” Among subsequent extended treatments of particular titles of the Code, one must mention an essay of mature reflection by M. Rheinstein. “The Code and the Family,” and a helpful elementary exposition by C. Lévy of “The Code and Property.” Incidentally, in these and other essays dealing, so to say, with substantive questions of the Code, numerous passing glimpses enable one to appreciate the attribution to the Code of its usual designation—the young First Consul urging forward the project of the Code, interest in which had been flagging (another facet of his conscious emulation of Frederick of Prussia?), appointing the legal commissions, presiding over the deliberations in the Conseil d’État, personally ensuring the inclusion of some provisions, *e.g.*, for divorce by mutual consent (was Josephine already being, mentally, sacrificed to dynastic ambitions?): truly, not sycophancy but common justice entitled the Code Napoléon.

The restraint in its substantive content doubtless was at least partly responsible for the superiority of the drafting form and style of the Code. A “legislative novation” (as Gény put it) and not a new Decalogue, it might be; but the Code was a code in the sense of the spirit of the so-styled enlightened rationalism and thus the source of law for the future, save where supplemented by subsequent legislation. It was thus an advantage that the drafters could facilitate interpretation by reason of having been able, through the retention of so much that was already known, to express their concepts and provisions in language which was currently and generally understood. This point is made by A. P. Sereni in his “The Code and the Case Law,” which for the rest gives a valuable exposé of the orthodox civilian attitude to the creative function and efficacy of judicial decision.

With its substantive and formal merits so demonstrated, it is hardly surprising that the French Code should have become—or rather have been

ab initio—the Code *par excellence*, acquiring a tremendous sphere of influence, not through imposition, but much more as the model inspiring subsequent codes in foreign lands; a topic on which J. Limpens contributes an interesting paper, "Territorial Expansion of the Code."

Turning from exclusive concern with the Code itself, Arthur von Mehren and W. Derenburg come closer to what one supposes to have been the intended spirit of the conference with comparative studies of the Code and common law approaches to, respectively, the formation of contract and the law of unfair competition in business. Each decides in favour of the Code: von Mehren, essentially, through the absence of consideration from the requirements of the Code—for there seems little merit in either "Statute of Frauds" provisions or *Art. 1341*; Derenburg, because the common law technique has necessitated the squeezing of these new economic injuries into old existing heads of tort so far as possible—*cf.*, *e.g.*, slander of title—instead of allowing a general approach to the question. Almost redressing the balance in a backhanded way, the editor, in "The Code and Public Law," shows what a fine thing the French have made of administrative law—which was not catered for in the Code—by a truly common law technique, the need for a different approach in the field of public law from that required in dealing with the civil Code having enabled them to see public law as a distinct branch of law in itself.

Among other essays, whose titles indicate the range of subject-matter, is the discussion, already adverted to, by Akzin of the Herculean problem of providing a code in Israel, where a variety of religions and of former political sovereigns has left a bewildering complex of legal systems in operation—Mohammedan, Rabbinical, the law of the Catholic Church, Ottoman and English law all go to make up the present legal system of Israel, and the situation is not helped by the fact that the spirit of the profession in Israel is essentially common law, while many of its practitioners have, inevitably, come from States in which they would have been reared in civilian modes of thought: "Codification in a New State," as it is entitled, is a captivating paper. Then J. H. Tucker makes a readable, desperate but (to the reviewer) ultimately unsuccessful attempt to maintain the continued civil law status of Louisiana ("The Code in Louisiana") and N. Stjepanovic relates the interesting, various stages in the legislation of post-war changes in Yugoslavia under the head, "The Code in a Socialist State." To complete the volume there are a disappointing and "bitty" purely factual contribution by Roscoe Pound ("Codification in Anglo-American Law"), some typical judicial *generalia* by the former Rinfret C.J. ("The Relations between Civil Law and Common Law"), "The Reconciliation of the Civil Law and the Common Law," by Vanderbilt C.J., which seemingly finds its theme in the greater proximity of the U.S. to France than to England in the matter of *stare decisis*, and a selective bibliography by J. J. Marke.

All in all, the volume will be seen to range wide and over an interesting field. In his Preface, the editor hopes that it will constitute a permanent contribution to comparative law: he should not be disappointed in that hope.

The book is well produced by the New York University Press: few misprints were noted, all save one, perhaps amusingly in the circumstances, in the citation of Latin expressions.

J. A. C. THOMAS.

A HISTORY OF ENGLISH LAW. By SIR WILLIAM HOLDSWORTH, O.M., K.C. Seventh edition. Revised by A. L. Goodhart, K.B.E., Q.C., and H. G. Hanbury. With an introductory essay and additions by S. B. Chrimes. [London: Methuen & Co., Ltd. 1956. 1, 78* and 706 pp. 45s.]

THE popularity of Holdsworth's Volume I is primarily due to its obvious merits, but it has also the advantage that the student here finds the material

he wants handled in a way which is refreshing and stimulating; it is clearly history, but with a marked legal approach. Historians are all the better for it.

The method here adopted is to reprint the text accompanied by *addenda* and *corrigenda* provided by the two general editors, and by the substantial essay by Professor Chrimes which occupies pp. 1*-77*. The fact that Professor Chrimes has been able to write his essay with the same arrangement as Holdsworth adopted for the principal text will indicate that the advances of the last thirty-five years or so have been fairly evenly distributed over the wide field covered by the volume. Those advances, although they often bring new sources to light, on occasion have given rise to discussions which have revealed in clearer light the issues involved. It is that sort of discussion which Professor Chrimes has often had to summarise from scattered periodical literature. In doing so, he has collected many valuable references and has employed much sound judgment in elucidating some very difficult but important problems.

It is pleasant to see that misprints have been by now almost totally eliminated, and it is difficult to find any substantial omission of new material: R. Somerville's massive *History of the Duchy of Lancaster* could well appear among the addenda to p. 115 and one would like to see the editorial opinion upon the important questions raised by Professor Hargreaves (in *Law Quarterly Review*, lxxviii, 481) on chancery origins. But one cannot have everything. The publishers have contrived to produce this handsome and valuable edition at the remarkably cheap price of 45s., which will ensure a very warm welcome to what is now a classic.

T. F. T. PLUCKNETT.

A BIBLIOGRAPHICAL GUIDE TO THE LAW OF THE UNITED KINGDOM, THE CHANNEL ISLANDS AND THE ISLE OF MAN. Published by the Institute of Advanced Legal Studies, University of London, jointly with the U.K. National Committee of Comparative Law, under the auspices of UNESCO. [University of London: Institute of Advanced Legal Studies. 1956. xi and 219 pp. including index. 30s.—interleaved copies, 36s. net.]

THIS is a most comprehensive bibliography which will prove very valuable to all students of Comparative law. Primarily designed for lawyers trained in the Civil law, it not only provides foreign lawyers with the appropriate lists of books; it also explains through the medium of short introductions the characteristic features of each branch that may present difficulties of form or substance to anyone trained in a Civil law system. The usefulness of this book is enlarged by the fact that in several cases the value of each book is indicated, so that in a single volume of average size, the reader is given the master key to the whole body of English law.

The book consists of twenty chapters, starting with a bibliography of bibliographies and ending up with Canon law. The division in chapters is addressed to the Civil lawyer. Thus we find a chapter on the Arrangement of English law (Chap. iv), and another on Civil law (Chap. vii). The latter follows the well-known subdivisions of Continental Codes. There are special chapters on Commercial law, and Public law. International law and Jurisprudence are also given a chapter each since the aim is not only to explain English law but also to give the general outlook of English lawyers to subjects with which the Continental lawyer is already familiar. The bibliography, finally, includes five chapters dealing with British regional legal systems in so far as they differ from English law, such as the law of Scotland, Northern Ireland, the Islands and the Commonwealth.

The introductions were prepared by the compilers of the relevant bibliography in each subject, in all thirty-eight law teachers and practitioners, experts in their subjects, under a Committee consisting of Professors C. J. Hamson, O. Kahn-Freund, F. H. Lawson (who also contributes the preface), Dr. K. Lipstein and Mr. K. Howard Drake. In the preface it is stated that the text has been "much modified in the interest of consistency" (p. vi) and, as a very high degree of uniformity is apparent, the modification was obviously very thorough.

This outline of the book would be incomplete, however, without some indication of its general approach and value. For this is no mere reference book. It is worth reading for its own sake by civilians and English lawyers alike. The compilers have, actually, followed no abstract principle in dealing with all the material available. Each subject is judged on its merits. Thus here, a mere list of books is considered sufficient, there, references to articles are included (*e.g.*, pp. 50-51). Elsewhere American books are also mentioned (*e.g.*, p. 43), whereas occasionally the law itself is explained (*e.g.*, trusts at pp. 46 *et seq.*). In the words of Professor Lawson "sometimes the introduction is short and fragmentary; sometimes it discusses at some length the general layout of the law; sometimes it even describes legal doctrine. Since the bibliography is intended as a practical aid to study and not as a work of art, the treatment is not uniform and not even symmetrical" (p. v). In short, the only principle adopted is the pragmatic one, "How is the foreign lawyer likely to benefit most?" It is this lack of principle in the treatment that makes this book so useful.

The difficulties of such an undertaking are, of course, enormous. For example, where recent books by living authors are commented upon, it is exceedingly difficult to avoid tendentious remarks, or to strike a balance between a long account from the civilian's standpoint and an epigrammatic book review. Again it must have been hard to discuss the relative merits of legal periodicals. Thus the *L.Q.R.* has case-notes that are "influential" and book reviews that are "authoritative." The *M.L.R.* is "academic in a good sense, (and) lives up to its name." For the *C.I.L.Q.* the only comment is that "It covers a wide range of subjects" (p. 5). As to the bibliography in each subject, those I was able to test, I found most informative and complete. The wide range of the chapter on Jurisprudence is particularly impressive, although the present reviewer would have wished to see included Patterson's *Jurisprudence*, H. Cairns' *Legal Philosophy from Plato to Hegel* (1949) and Hamburger's works on Aristotle's legal theory. The chapter on Roman law might include with profit Hunter's valuable introduction and a stimulating recent book, H. J. Wolff's *Roman Law* (1951). The claims for Stephen's *Commentaries* would appear to have been rather exaggerated and I, for one, doubt if its usefulness for English or Continental lawyers is as great as it is suggested.

These are, however, details. What is most striking is that in many ways this is a sort of introduction to English law from the Continental standpoint. Those of us who take English law for granted will look at it with a fresh outlook. How odd must English law look through foreign spectacles. The present reviewer, who was brought up under a Continental system but was trained as an English lawyer, only now was able to appreciate all the civilian criticisms of English law at the same time. At the risk of making an unfair and obscure statement, in some ways this book does for English law what Professor Lawson's brilliant book *A Common Lawyer Looks at the Civil Law* has done for Continental law.

In spite of its comparatively high price, this book will prove indispensable for any comparative work undertaken by civilians or English lawyers. For, although it is designed for the former, the latter are also provided with the easiest way of understanding the difficulties of foreign lawyers when faced with English law. The compilers of this Digest and the Institute of Advanced

Legal Studies have certainly earned our admiration for the imagination and enterprise that led to the publication of a book which is unique in its character and usefulness.

A. G. CHLOROS.

THE MORAL DECISION. Right and Wrong in the Light of American Law. By EDMOND CAHN. [Bloomington: Indiana University Press. 1955. ix and 342 pp. \$5.]

AMERICAN judges, like judges everywhere, are often faced with moral decisions when deciding apparently legal issues. Professor Cahn has taken a number of actual cases in American law and used them to illustrate the moral concepts which judges employ in deciding legal disputes. The first part of his book discusses morals in general and he draws a number of distinctions between these and law proper. He then discusses his selected cases and uses them as pegs on which to hang his own reflections about the relationship between law and morals. The final section of the book is concerned with the law of procedure as a source of moral concepts.

The idea is certainly an interesting one, but the author although he is a man of great erudition and has read widely has not succeeded in writing an interesting book. The narrative is frequently heavy and almost unreadable, his style is both florid and verbose, and his moral concepts are highly individual and to say the least somewhat curious. Thus in discussing marriage he writes: "For here a moral factor operates that is relatively new in human history—that is the great and increasing availability of contraceptives which if not perfect are at least highly dependable. This development, one of the important benefactions of modern science and technology, ought to liberate society from an age-old incubus: the doctrine—suitable perhaps to the animal world but hardly to the aspirations of our species—that love is primarily a reproductive activity, and that all its other benefits are at most derivatively legitimate. Of this incubus we can probably consider ourselves freed" (p. 92–93). One reflects that "the aspirations of our species" would not get the human race very far if love ceased to have reproductive effects! Again his doctrine of progressive morals which is stated in an exuberant passage at p. 314 as though it were an accepted axiom is in fact highly dubious. I quote the passage in full because it is typical of the style of writing which although popular on the far side of the Atlantic has fortunately few exponents here. "Yet as our survey shows recurrently, the living generation of men always hold a supreme cosmoplastic *opportunity*. Though they may blunder and falter on the way, as long as they live the capacity remains with them to create moral standards superior to those their fathers evolved. In the annals of our species, it has never been enough simply to stand still and cling to the past. The prophets of past ages deserve honour precisely because they surpass their predecessors in applying the moral constitution to the problems and conflicts of the cultures in which they lived. The moral evolution they carried forward acknowledges no line at which to halt." The publishers in a blurb as lyrical as much of the actual content of the book describe it as enabling the reader "to make enlightened decisions in the moral confusion of our times" and as providing "a new experience in understanding and living." At least one reviewer must be allowed to express a vigorous dissenting judgment on both points.

NORMAN ST. JOHN-STEVAS.

GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES
PRIVATRECHTS. By JOSEF ESSER. [Tübingen: J. C. B. Mohr
(Paul Siebeck). 1956. 394 pp.]

THIS interesting work is an important contribution to the comparative study of the judicial process. The author has demonstrated on a broad comparative basis that the creative function of judicial practice is not less important in the codified civil law systems than in Anglo-American law, and that the contrast on this point between these legal families is more nominal than real.

The author points out that the existence of general principles is of overwhelming importance for the judge in developing the law. It is these general principles which furnish the norms to be applied where existing rules prove insufficient to decide the case before him. The basic contrast between civil law method and common law method lies rather in the technique of applying general principles than in the oft-cited distinction between codified law and case law. Under the more systematic civil law method the judge tends to justify each step in the formation of new legal rules by evoking principles; in contrast the common law method is a linear development from case to case where principles are merely the "starting points" in the casuistic development of cases.

The notion still prevalent in Continental legal systems, that the judge's function is limited to "finding" the law which is already there and filling the gaps left by the legislator, is forcefully criticised and demolished by the author. It would be impossible to discuss in a limited space the numerous valuable insights and fascinating parallels between the various legal systems which his analysis reveals. This analysis of the judicial process is based not only on a rich store of the literature of Continental Europe and of Anglo-America, but also on ample case law of these countries.

The work, in spite of its originality and broad learning, has one unfortunate shortcoming: it is written in a style which is difficult to follow. Its formulations are frequently obscure and heavy, and its statements sometimes unnecessarily repetitive. It may be a barrier to the reader who can only with great effort follow the author's exposition. But the effort is well worth making.

CHARLES SZLADITS.

REPORT OF THE LEGAL RESEARCH COMMITTEE OF THE CANADIAN BAR
ASSOCIATION.

THIS Report is printed in Volume 34 of the *Canadian Bar Review* for November, 1956 at pp. 999-1064. It is an interesting document and much that it says might well be taken to heart in the United Kingdom.

In 1954 a special committee of considerable distinction was appointed to look into the position of legal research in Canada. Their report makes it clear that they did not like what they found—or failed to find. The legal profession in Canada was "deficient in research and writing, in the personnel capable of doing research, in the facilities for research, and in the general interest in and des're for research" (p. 1012). So far the committee were unanimous, and their detailed report leaves no doubt that they were right. They were also unanimous regarding certain specific proposals of a more or less minor character (see pp. 1051-1052). But on their major recommendations they fell apart. The prevailing opinion favoured a somewhat grandiose scheme for a Legal Research Foundation designed to be a kind of Law Reform Committee, Institute of Advanced Legal Studies, and American Law Institute rolled into one. Dean Cecil Wright, in a characteristically outspoken memorandum of dissent, attacked this scheme as liable, at present, to do more harm than good.

Since the majority conceded (see pp. 1050 and 1052) that "the main problem of legal research and legal scholarship centers on the production of better law schools" the improvement of the law schools should be "the key issue of the report" (p. 1057). The majority attempted to meet this argument by pointing out that the two proposals are not mutually exclusive and that the Foundation "will be a valuable addition to the present organisation of the profession, will symbolise the importance of research to every practitioner and will give continuity to the work our committee has already begun" (p. 1052).

There is clearly much to be said on both sides—and both sides say it well. The desire of the majority to produce something dramatic that will appeal to the heads and hearts of the profession—and to the deep pockets of the charitable foundations—is understandable. And Dean Wright's expressed distrust of "the climate of professional indifference" may perhaps be somewhat modified by later developments in Ontario—where the Benchers of the Law Society have recently adopted a thoroughly progressive attitude towards legal training and solved their unhappy differences with the universities. It is also true that collaboration between teachers and practitioners in projects of legal research may enhance the influence and prestige of the law schools and their teachers—as has the work of the American Law Institute. But when all this is said the present writer is bound to confess that he too views with some misgivings what seems to be a possibility that large-scale organised research will be attempted before a corps of trained legal scholars and researchers is available to direct and undertake it. Within well-defined limits, "projects" are a desirable feature of a mature professional and academic organisation, but "projectivitis" is a disease which can be fatal and which seems to thrive on American soil. In the U.S.A. the law schools have produced a body of legal scholarship healthy enough to resist an epidemic and to emerge from an occasional attack purged and invigorated. This Report shows that it is doubtful, to say the least, whether the same could be said of Canada.

But whatever may be thought of the major proposal and whatever may become of it, the Report can be heartily recommended for its close and convincing analysis of the present position and of the case for reform. It shows that there is no complacency among those who control the Canadian profession; in this respect at least they may be ahead of us in the home country.

L. C. B. G.

HANDBOOK OF THE LAW OF BANKRUPTCY. By JAMES ANGELL
MACLACHLAN. [West Publishing Co., St. Paul, Minn. 1956.]

AN English lawyer studying an American legal textbook is struck by the extent to which the American lawyer stands at the elbow of the business man. It is true that bankruptcy law is essentially a branch of commercial law. It was described by Baron Albéric Rolin as "commercial police law." Nevertheless, the English textbooks on the subject are dry and technical. Students are introduced to the mere outlines. Practitioners rely on an elaborately annotated edition of the little-amended statute by which the relative English law was consolidated in 1914. Academic writers have left the soil virtually untrodden.

Professor MacLachlan does not pause to inquire whether those dry bones can live. His racy pen rouses them at times to a positive *danse macabre*. He never hesitates to criticise what he thinks is bad or to comment on what could be improved. He refers quite frankly to the possibilities of corruption in speaking of such provisions as that which bars from appointment as referees relatives of a local justice or judge who are even as remote as his second cousins (p. 67), and also in mentioning those efforts which are made to curb clandestine fee-splitting between trustees and their attorneys. (Chap.

11, s. 129.) "Referees," he comments (at p. 121) regarding reciprocal favours between lawyers, "differ in alertness to prevent abuses. Some feeling of fellowship among members of the bankruptcy Bar is consistent with the sound administration of estates. No text can prescribe a formula for the solution of practical problems here, but it is clear that no part of the attorney's fees should find its way directly or indirectly into the pocket of the trustee." English lawyers would feel hurt if a distinguished university professor thought it necessary to say such things with reference to their "practical problems"!

The Bankruptcy Act itself comes in for its measure of abuse, too. The headnote to Chap. 16, s. 197, p. 212, states baldly that understanding the provisions of the Bankruptcy Act in relation to summary and plenary jurisdiction is obstructed in three passages in the same Act. Examples of this alleged stultification are then mercilessly set out. There is plenty of other criticism as well. The chapter on Acts of Bankruptcy (Chap. 6) is almost a running attack on the policy of the law, interspersed with advice as to what it should more wisely be. Occasionally the comments assume an almost Baedeker-like quality of acid consolation. There is a passage (at p. 74) referring to the practice of maintaining panels of receivers from which all appointments in bankruptcy cases are normally made. The learned author remarks: "While such a practice does not necessarily insure the highest quality of performance, it should tend at least towards equalizing the quality of the appointments and reducing the risk of outright incompetence. As the scale for compensation for receivers is restricted, the competence of available candidates for the office may be correspondingly limited." Were such observations ever to find their way into a solid English practitioners' textbook, they might be regarded as unkind.

Professor MacLachlan, however, pulls no punches. Even the monumental Mr. Justice Holmes is shaken from his pedestal. He is, if one may use the expression, well and truly "debunked," with chapter and verse all cited, at page 331, and sent reeling again at page 425, almost before he has "taken the count." Speaking of the "doctrinaire generalisations" of a "school of conceptualists" regarding the supposed impossibility of a firm being bankrupt while the partners are not, the comment is added: "A dictum to this effect by Holmes J. in 1913 much aggravated the confusion then current. At long last, in 1928, the Supreme Court flatly repudiated the Holmes position." With what justification it is not for an English lawyer to say, but the reader is left under the impression that wisdom culled at the breakfast table does not necessarily breed sagacity on the bench.

Yet it must not be supposed that this important work comprises nothing but a succession of vivid high-lights. Readable as it is, it contains a mass of learning on American bankruptcy law, so skilfully arranged that it serves alike as a handbook for the legal practitioner and a book of reference for the business man. It presents bankruptcy not as an isolated topic, but in its proper setting, as one of various means of dealing with those who are unable to meet their debts as they become due. It does not claim to cover the whole ground or to fulfil all the needs of the practitioner who specialises in bankruptcy. That is expressly disclaimed in the Preface, which speaks of the urgency of the approach from the point of view of the student, or of the lawyer who does not specialise in bankruptcy.

To English readers it is of absorbing interest from the point of view of comparative law. Here is a legal system which stems from the common law of England itself, but which has been moulded and guided into its present form by conditions wholly different from those prevailing on the older side of the Atlantic. Adjustments as between federal and state laws, special precautions against abuse of patronage and corruption, the greater emphasis on business life, the political leverage exercised by farmers, the robust survival of the popularity of the jury (which may be invoked to decide such issues even as a debtor's insolvency, and whether an act of bankruptcy has been committed),

and the assimilation of bodies corporate to individuals, all constitute points of departure from what to the English lawyer is the norm. Among the many points of difference, those most notable in English eyes, besides the different definition of insolvency, are the absence of the procedure by bankruptcy notice, of the single petitioning creditor (except in very small cases), of the receiving order, of the public examination, of the official receiver, of the "order and disposition" clause and the doctrine of relation back, and of the suspended discharge, as well as the presence of a large class of exempted assets and an obligation to distribute an early dividend. In the field of conflicts, it is of interest to note that since 1952 American law has at last abandoned its rigid adherence to the principle of territoriality, and has made a move towards universality in recognising the title of the trustee to the foreign assets of the bankrupt, and the right of foreign creditors to share equally with others in the estate of a debtor made bankrupt both at home and abroad.

Professor MacLachlan's thirty years of preoccupation with questions touching bankruptcy law have certainly not been spent in vain.

WALTER RAEBURN.

THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW. By J. MILNES HOLDEN. [University of London: The Athlone Press. 1955. xl and 352 pp. Six plates. 42s.]

THE history of the bill of exchange on the continent during the middle ages has long been a subject of study and some of the most celebrated legal historians have engaged in it, including Brunner and Esmein. Its development has long been a conspicuous example of the custom of merchants conflicting with some of the basic ideas of Roman and local laws; in England, as elsewhere, the transferability of a debt was much distrusted, and the idea of negotiability ran counter to fundamental legal principle. This, and the curious regression caused at the renaissance by the revival of "classical" Roman law, is well known to readers of Holdsworth.

The corresponding history of these matters in England is less familiar; Dr. Holden has made good use of Sir Hilary Jenkinson's study on tallies, and Professor Postan's *Financial Instruments*, but his principal business does not begin until 1602 when he takes up the history down to 1710 when Holt retired. Dr. Holden acquits Lord Holt of having held the view that bills were specialties (a view attributed to Holt by Street and after him by Holdsworth; perhaps Street was influenced by Ames, who certainly regarded a bill as a "mercantile specialty" and detected a "fallacy" in *Rann v. Hughes*).

A full and careful discussion of Holt is followed by one upon Mansfield, and that by a chapter on the century leading up to the Bills of Exchange Act, 1882. In that century, indeed, a vast mass of detail adapted the old principles to the newer needs of commerce. Above all, the use of the cheque became universal. Here the legislature contributed some more than usually inept taxation, and there was much experiment with various types of crossing. In the end it became evident that the process of history had been reversed. The triumph of the idea of negotiability in spite of the best academic opinion of Roman, Canon and common lawyers is one of the most spectacular achievements of commercial lawyers: business had won over dogma. Yet the cheque, or its users, eventually regretted "the blessing (or the curse) of negotiability" which lay upon cheques crossed generally or specially. Dr. Holden would have welcomed an Act of Parliament which would have made all crossed cheques payable to order non-negotiable: "business men would soon have learnt the elementary principle that they could not obtain any better title to such cheques than their transferors." It certainly took many centuries to teach them the lesson which it is here suggested that they should forget.

The book concludes with some twentieth-century history (including the story of the "chequelets") and a call for "a new non-transferable instrument." Dr. Holden has produced a most stimulating book and the Press has produced it worthily. Unhappily references are not to the *Statutes of the Realm* edition.

T. F. T. PLUCKNETT.

THE LAW OF NEGOTIABLE INSTRUMENTS IN SOUTH AFRICA. Third Edition. By DENIS V. COWEN, assisted by LEONARD GERING. [Cape Town: Juta & Co., Ltd. 1955. xxxvii and 534 pp. (with index). 72s. 6d.]

THE late Professor Emmett, for many years Professor of Law in the University of Cape Town, published in 1938 a small but useful volume on negotiable instruments. In 1948 Professor Cowen of the same university brought out a second edition of this work. This production, of no great importance in itself, evidently fired the new editor with the determination to write a comprehensive and searching study of the whole subject of negotiable instruments, an ambition which he has carried out in the present edition. To call it a new edition is no doubt a courtesy to the memory of Professor Emmett; actually it is a new work, and one of much greater value than the original. For Professor Cowen has produced a scholarly and comprehensive study of his subject which is likely to become the bible of all serious students of negotiable instruments. Indeed as far as my own reading goes its only serious competitor is the admirable Canadian work of the late Dean Falconbridge.

The title of the work is indeed rather misleading, for Professor Cowen's book is essentially a study of the English law on the subject, though he shows in detail how it has been applied, and in application sometimes modified, by the courts in South Africa. On the whole it has been the English mercantile law and not the Roman Dutch law on the subject which these courts have applied, but Roman Dutch law is naturally very much in the minds of South African judges, and Continental doctrines are therefore more often apposite there than here. An interesting example of this is the aval, never quite accepted in this country, but taken over in full in South Africa and explained in some detail by Professor Cowen in an interesting chapter in this book. But this impingement of Continental law on the South African law has driven the author into a much more careful study of Continental sources than English lawyers, even specialists in the subject, are accustomed to make, and this he uses with a wealth of citation which makes the book a positive goldmine for the scholarly student. Equally careful and exhaustive have been Professor Cowen's researches into the law on this subject as worked out in the courts of other Commonwealth countries and in the U.S.A. In the result we have an admirable essay in comparative law which would have delighted the late Professor Gutteridge. It is a pity that the Geneva Conventions on the Unification of the Law of Bills of Exchange and of Cheques receive such cursory attention, treatment of them being indeed confined to a footnote, for to the comparative student of this subject they afford a most important field of study.

But Professor Cowen has not only cast his net wide in the domain of comparative law, he has also given careful attention to the historical development of the subject, and in this I think he shows wisdom, for, as with most branches of mercantile law many of the most tiresome problems in the law of bills of exchange can only be understood in the light of the historical process. It was unfortunate that Dr. J. M. Holden's admirable *History of the Law of Negotiable Instruments* only appeared when Professor Cowen's work must have been ready for the press, for, while he refers to it on a number of points of

detail in regard to cheques, he obviously did not have time to pay proper attention to its argument in his general historical survey.

I will now turn in rather more detail to Professor Cowen's exposition of the law, and if in doing so I appear to become somewhat critical this is certainly without prejudice to what I have already said, and because even in the best of books there are bound to be some blemishes which a reviewer may sometimes help an author to remove.

The functions of the bill of exchange as part, indeed the major part, of the mercantile currency is well explained, though it might perhaps have been underlined with special reference to Lord Mansfield's basic treatment of the subject in *Miller v. Race*. Professor Cowen tends to equate currency with legal tender, but for the purposes of the merchant and banker, and indeed for the economist this is not so. One misses here the apt illustration: indeed our author is in many parts of the book rather too ready to refer us to Chalmers for illustration. A very good example of this is furnished by the rather cursory treatment of negligence under section 82 of the Bills of Exchange Act, 1882, certainly a vital subject in England and one requiring a careful analysis of the decided cases. Professor Cowen, however, is content to leave the matter with an omnibus reference to Chalmers and Byles: he cites only one case and does not refer to its facts.

Although as I have said Professor Cowen's exposition of the basic principles of negotiability is admirably clear and succinct I regret the absence of a discussion of the difficulties of definition such as is provided in elementary textbooks like Willis and Jacob, and which undoubtedly assist students to get to grips with a difficult conception. Similarly he fails to pray in aid the semi-negotiability of the bill of lading which is not only an important matter in itself, but throws a good deal of light on the general problem. Indeed Professor Cowen might consider with advantage a discussion of the whole problem of the document of title to goods in respect of negotiability.

I would like to draw particular attention to the chapter on Signature. There is no more difficult subject in the law of bills of exchange than this, particularly in regard to signatures by agents, a matter which became of added practical importance when the Companies Acts began to give increasing currency to company bills. Professor Cowen's treatment of it is masterly in the clarity of its analysis. He makes excellent use here, and indeed elsewhere, of the American Law Institute's Restatement.

I have already referred to the interesting subject of the aval. An accommodation signature is not of course an aval, but it appears to be the rudimentary obligation out of which the aval grew. At any rate, as Chalmers pointed out, it is the nearest English equivalent. It is rather surprising therefore that Professor Cowen treats the two subjects quite separately and apart from a footnote does not attempt to bring out the connection. Moreover in the chapter on the aval on the basis of a rather tenuous connection between *Steele v. M'Kinlay*¹ and the doctrine of the aval, he launches out into the difficult waters created by a number of English cases like *Jenkins v. Coomber*² where the precise order in which indorsements were made, and also questions of authority to indorse under section 20 of the Bills of Exchange Act, 1882, were raised. The whole position was bedevilled for some fifty years by *Steele v. M'Kinlay* until common sense at last came to the rescue in *McDonald v. Nash*.³ But all this problem has not much connection with the aval of Continental law, and seems a bit out of place in this chapter.

The chapter on cheques is rather patchy. It starts with an admirable study of the legal conception of the banker, which is succeeded by an even better analysis of the banker's obligation to pay his customer's cheques and

¹ (1880) 5 App.Cas. 754.

² [1898] 2 Q.B. 168.

³ [1924] A.C. 625.

of the conditions which must be satisfied for this duty to arise. This seems to exhaust Professor Cowen's interest in the subject of cheques, the discussion of which he concludes in comparatively few pages which are mostly devoted to a straightforward discussion of crossings and their effect. As I have mentioned earlier the vital subject of collection with the attendant difficulties of conversion, negligence and the tiresome decision in the *Gordon Case*⁴ are touched on in a very cursory manner.

The two remarkable appendices deserve a special word of praise. The first of these provides a thorough survey of Bills of Exchange Legislation on a comparative basis. The second contains a very full bibliographical study of the subject which, however, is somewhat perfunctory in respect of the periodical literature; a pity, because the footnotes throughout the work bear witness to Professor Cowen's thorough acquaintance with this.

C.

DER INTERNATIONALE KAUF. ABKOMMEN UND ABKOMMENSENTWÜRFE ZUR VEREINHEITLICHUNG DER KOLLISIONSNORMEN DES KAUFVERTRAGS. By ANTON V. SPRECHER. [Zürich: Zürcher Studien zum Internationalen Recht. Nr. 24. Polygraphischer Verlag AG. 1956. 180 pp. Sw. Frs. 14.]

For no fewer than sixty years, comparative lawyers have been trying to bring about a unification of the law of conflict of laws relating to those types of sales of goods which form the bulk of international commercial business. The final version of the draft convention suggested by the seventh conference on private international law, which took place at the Hague in 1951, is the latest product of these endeavours. The present work, a doctoral thesis of the University of Zürich, contains a summary of the history of these attempts and a historical and critical analysis of the rules of the final version of the draft convention. It also deals with the draft conventions on the transfer of ownership in respect of goods sold, on the jurisdiction of courts and on representation and agency in regard to international sales, which were the subject-matter of discussion at the eighth conference. An appendix contains a reprint of the most representative drafts and suggestions during the past sixty years.

The author has mastered his task exceedingly well. He has succeeded in giving to his readers a clear picture of a complex development. He has shown how the experiences of sixty years of untiring efforts have forced even the most intrepid pioneers of progress in this field to restrict their activities to an ever narrowing field, to jettison merely academic ideas, to replace technical legal language by fresh terms not yet stamped with a definite meaning and to split the topic into several draft conventions in the hope that small-scope-conventions might meet with less opposition than comprehensive ones. He is appreciative of the value of the final draft adopted in 1951, though somewhat pessimistic—no doubt rightly so—as to the attitude to its adoption of lawyers in this country. The author's work shows solid learning, the ability of attractive presentation and a very robust common sense. Professor Niederer, who suggested the subject-matter of this thesis, deserves to be congratulated on the choice of a topic that cannot fail to be of great and immediate interest and importance.

E. J. COHN.

⁴ [1903] A.C. 240.

TAX PLANNING AND THE FAMILY COMPANY. By DAVID R. STANFORD, M.A., LL.B., of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1957. xxviii and 412 pp. £2 10s. net.]

ONE of the most interesting and encouraging developments of recent years has been the remarkable flood of legal literature on taxation. This is symptomatic not only of a belated awareness by the profession of the practical importance of the subject, but also of an even more belated recognition that the subject is one worthy of scientific study and one that can be written about in an interesting and readable fashion. Until recently this branch of practice was served only by books which, whatever their other merits, were repellent in style. Now, thanks to the works of the late Dr. Farnsworth and Messrs. Beattie, Grundy, Monroe, Nyland, Potter and Wheatcroft, almost every aspect of the subject is covered by one or more books which can be read with real enjoyment and profit by students and practitioners. No higher praise can be accorded to Mr. Stanford's book than to say that it deserves a place alongside the works of the authors already named. What Potter and Monroe have done for Tax Planning in general and Wheatcroft has done for Settlements and Gifts in particular, is now done for the family company in greater detail than in Mr. Grundy's little introductory book.

Mr. Stanford organises his material into nine chapters which, where appropriate, contain precedents of the clauses needed to take advantage of the planning proposals suggested in the text. After an introductory chapter on The Family Company and Control the book deals with Estate Duty, including liability under sections 46 and 55 of the Finance Act, 1940, Surtax, Profits Tax, and Provisions for the Future. The author says in his Preface that it may be read without previous knowledge of the subject and that it is hoped that its fresh approach will prove of use to those already well versed in its mysteries. Both these claims are justified, subject only to the warning that a newcomer to the subject may find certain parts tough going, especially, perhaps, the opening chapter. In general, however, the author is successful in making the mysteries less mysterious and, both for its elucidation and for its practical advice, the book can be most cordially recommended.

L. C. B. G.

PENSION SCHEMES AND RETIREMENT BENEFITS. By GORDON A. HOSKING, F.I.A., F.R.S.S., M.I.T. [London: Sweet & Maxwell, Ltd. 1956. viii and 372. £2 2s. net.]

PENSION SCHEME PRECEDENTS. By WILLIAM PHILLIPS, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1957. £4 4s. net.]

THESE two books give the practitioner who has to settle or advise upon a pension scheme virtually everything he needs. Hosking's is a textbook covering the entire field, and though it is not primarily concerned with the legal aspects of pensions, the manner in which the administrative, financial and actuarial considerations are dealt with makes it particularly useful to a lawyer coming fresh to this branch of the law. Not seldom when a new scheme is introduced a decision to insure the benefits with a Life office is taken, not because greater benefits can thereby be secured, but because the sponsors are reluctant, perhaps because of inadequate advice, to face the problems of financing the scheme themselves. The advantages of privately administered schemes are set out in

Chapter 28. The usual aids expected by lawyers in a textbook are missing; there is no table of cases or statutes, and the index is short. Very few cases are in fact cited, but the practice of the Revenue, so important in relation to these schemes, is fully dealt with. The provisions of the Finance Act, 1956, as to retirement and other annuities are touched upon only briefly.

Phillips' on the other hand is a book by a lawyer for lawyers. It is a substantial work, though owing to the failure to number the pages it is difficult to estimate its precise length. The short table of cases underlines how much of this important branch of the law has never been reviewed by the courts. Part I contains a very useful summary of the law, though it would be preferable to give intelligible paraphrases of the relevant sections of the Acts, rather than to transcribe them. Most of the remainder of the book consists of precedents with extensive notes, the chief objection to which is that such a variety of forms is offered that a draftsman not familiar with the work may find it difficult to select a suitable framework for his scheme. The older forms of real property assurances have in the course of centuries acquired stereotyped forms, within which suitable variations can be made to meet particular cases. This stage has not yet been reached in the case of pension schemes; when a second edition of this work is called for, as it surely will be, perhaps it will be possible to take a further step in that direction.

G. A. G.

RATING AND VALUATION PRACTICE. By PHILLIP R. BEAN and ARTHUR LOCKWOOD. Fourth Edition. [London: Stevens & Sons, Ltd. 1956. 370 pp. 45s. net.]

THE latest edition of this work takes account of the changes in the law of rating effected by the Valuation for Rating Act, 1953 and the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Most of these important new provisions are printed fully in the text. The authors, both of whom are chartered surveyors, have been extremely cautious in their commentaries upon the new provisions and the legal practitioner will derive little help from them in attempting to answer the legal problems which the more difficult of these provisions, such as section 8 of the 1955 Act, raise. The strength of this work lies, in this as in former editions, in its treatment of valuation problems and in the informative examples of valuations which it provides. Whilst the work remains therefore one which is chiefly of value to rating surveyors, it can also be recommended to those legal practitioners who need to understand the mysteries of rating valuations.

K. F. GOODFELLOW.

THE COPYRIGHT ACT, 1956. By D. H. MERVYN DAVIES, M.C., LL.B., of Lincoln's Inn, Barrister-at-Law, formerly a Travers Smith Scholar and Daniel Reardon Prizeman. [London: Sweet & Maxwell, Ltd. 1957. xii and 135 pp. 21s.]

THIS is an annotated edition of the new Copyright Act with a brief (24 pp.) introduction, tables of comparison with the 1911 Act, and an index. The annotations are designed chiefly to indicate the derivations of the sections and what other provisions of the Act ought to be borne in mind when reading any particular section, but there is a pretty full citation of cases which have interpreted the re-enacted provisions of the older Act. The book might have been still more useful had there been fuller citations from the Report of the Copyright Committee and references to Government statements

during the course of the Act's passage through Parliament. These may not be admissible in court in aid of construction but it is a foolish lawyer who disregards this source of possible enlightenment when called upon to advise on a novel provision; and one of the most helpful tasks that a book of this sort can perform is to give the appropriate Hansard references. Nevertheless this book will prove helpful to anyone who wants a durable copy of the new Act with some assistance in finding his way about in it.

L. C. B. G.

LAWS AND FLAWS. (Lapses of the Legislators). By EDWARD F. IWI. [London: Odhams Press. 222 pp. Price 21s.]

It is a pleasure to recommend this entertaining book. It consists of ten sections—each made up of a varying number of short chapters—whose titles indicate the wide range covered: "The Royal Family," "Parliament," "Delegated Legislation," "The Judiciary," "The Royal Prerogative," "Maces," "Reform of the House of Lords," "Commonwealth—Empire—Rockall," "The Church," etc. Much of the material has been published before, mainly in the form of Mr. Iwi's well-known letters to the Press, but spread over so many publications and over so many years that it was a most acceptable idea of Dr. A. L. Rowse to persuade the author to collect them in a book. As he modestly points out, there is no logical connection between the subjects covered. "This is neither a textbook nor an autobiography" (p. 9). In a sense the latter is what it proves to be. The link which binds "the Cloth of Estate," "Death of a Speaker" (NOT a detective story!), "Judicial Oaths," "Passports—Whose Property?" and "Dominion Privy Councils" to "Bishops," "Bastards," and "Death Shrouds"—all of which are chapter headings—cannot be other than Mr. Iwi's personal interest. We are given an intriguing glimpse of the author as *paterfamilias* walking in a park in 1941 with his children, aged 8 and 3, being suddenly struck by the idea of sending the Crown Jewels to a Dominion for safety, forthwith abandoning his luckless offspring and dashing off to pen a Memorandum to the Authorities (p. 28). Indeed, a better sub-title than that adopted might have been "Constitutional Crises I have averted." Since 1928 (p. 33) a flood of Memoranda has covered matters ranging from those of utmost importance—notably the hair-raising problem of the Wrong Counsellor of State (p. 19), where inattention to the Regency Act had led George VI into the *ultra vires* act of naming the fifth adult in the succession as a Counsellor—to the trivial, but baffling, problem of the Precedence of the Coroner of the Verge (p. 30). Mr. Iwi drew attention to the deadlock which would ensue if the Speaker died in office at the height of the war, only to have that gentleman die on him before legislative action had been taken—with serious consequences (p. 54). All this provides a fund of most amusing, but also thought-provoking, reading. Here is a soufflé of legal anecdote and speculation, light enough for the bedside book-rack: stimulating enough to promote academic speculation.

There are many more problems to which Mr. Iwi might—and, we hope, will—turn his attention. If the Queen's right hand is injured, so that she cannot sign, does a regency ensue? Presumably she could not appoint Counsellors of State, as this is done by Letters Patent requiring her signature. If the Great Seal was destroyed by bomb or fire, how could the Constitution be kept going until a new one was prepared? Presumably Parliament could still sit, but the Queen would have to give the Royal Assent in person, the seal being necessary to appoint commissioners. Can a woman be appointed Lord Chancellor, in view of the non-admission to the House of Lords of women peers? After all, the Woolsack is technically not "within" the House. If so, how would she be addressed? The "address" problem can also be posed of a woman Speaker or High Court judge. It has happily recently

been settled in the case of a recorder. Could an Assize begin if the Commission was missing? Would it suffice if the Clerk was able to recite it all by heart? Can a death sentence be validly imposed in the absence of (a) the black-cap; (b) the Sheriff; or (c) the Chaplain, to say "Amen"? Every reader will have his own conundrums to set and ponder over.

The treatment of Rockall (p. 205) is disappointing—at least to an international lawyer. There is grave doubt whether our act of taking "possession"—a very brief landing—is sufficient to give any title, in view of the international law decisions requiring some "effective authority" over a *terra nullius* by the State claiming it. Does Rockall have its own territorial waters, being a tiny uninhabited rock? It is difficult for the United Kingdom to assert this, having regard to some of its arguments in the *Norwegian Fisheries Case*. We cannot agree that it is owned by the Queen free from ministerial advice (p. 206). As she owns it (if at all) in her public capacity—as the author admits—the normal rule of ministerial responsibility must apply. As it was a United Kingdom ship which "annexed" it, the United Kingdom Cabinet can advise on it. In his interesting treatment of Parliamentary maces (p. 129) it is odd that the author does not mention the custom by which the maces are covered with a cloth when the Sovereign is present. This is surely relevant to his discussion of whether they are emblems of the authority of the Speaker, or of the Sergeant-at-Arms, or of the Crown. In discussing the Royal Marriages Act (p. 24) he overlooks the remarkable—indeed annihilating—flaw discovered by the reviewer (*Modern Law Review* 1951, pp. 53 *et seq.*), which has not yet been disproved and indeed found strong support in the *ratio* of the House of Lords' and Court of Appeal's unanimous decisions in *Prince Ernest of Hanover v. Att.-Gen.*, itself revealing a startling "lapse" of the legislators, that Acts of Parliament must be strictly interpreted.

There are a few minor inaccuracies, but this book will prove a most worthwhile addition to any library.

C. D'OLIVIER FARRAN.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA. By A. T. MARKOSE, M.A., LL.D. [Madras: Madras Law Journal Office. 1956. 1 and 752 pp. 35s. net.]

THIS book is a most welcome addition to the library of the Indian constitutional lawyer, and the Indian administrative lawyer will be happy to see it on his almost bare bookshelves. Neither will find elsewhere a comparable account of the law relating to the prerogative writs, and the administrative lawyer should find the chapters relating to declaratory decrees and injunctions suggestive of new lines of approach to the problems with which he is faced. But the principal appeal of this book will be to the academic lawyer and the advanced student, both of whom will rejoice to find such a large volume of case law collated and assessed from an eminently reasonable and good-humoured standpoint, by an author who never loses sight of the necessity of striking a proper balance between administrative efficiency and the rights of the individual.

The author emphasises—and your reviewer would stress the necessity for the emphasis—the individuality of the basic rules of Indian law, which cannot properly be understood by going back to 1950 or even 1947. He is not neglectful of the rules of cognate systems; in fact he uses the comparative method, not only to illustrate, in other systems, principles relevant in India, but also to indicate what rules in those systems are unsuitable in India and why. Not only does he give an excellent outline of Indian legal history since 1773 but again and again, in discussing the various remedies available against public authorities, he indicates what unsuspected treasures are to be found in the older Indian law reports.

The administrative lawyer, he maintains, will discern these outstanding features of Indian law. India having been long ruled by a corporation, the right of suit against government was early established; in the formative years, legislation proceeded without political opposition; before it was generally regarded as a legitimate function of government, the State pursued economic activities, and earlier than in most countries experiments in judicial control of administrative authorities became necessary; the superior courts were denied original jurisdiction in revenue matters; the orbit of the prerogative writs until the Republican constitution came into force was excessively restricted, with the result that the law relating to injunctions and declaratory actions to remedy illegal and arbitrary acts of government and its instrumentalities made a more rapid development during the British period than it has done since.

Since independence Congress has too rapidly forced its legislative programme through the legislatures; the individual legislator has been unable to ensure attention to his views; the average Indian citizen respects neither law nor authority. The legislature can, no doubt, control administrative action from the standpoint of public welfare, and the higher administrative authorities from that of administrative efficiency, but the courts, which in India have ever been mindful of the rights of the individual, are peculiarly fitted to exercise control from that standpoint. Generally the problem is not to protect the citizen from wickedness, but from enthusiasm for the public welfare which perverts statutory powers to unintended purposes. It is doubtful whether anything resembling the Conseil d'Etat would work successfully in any Commonwealth system, and more than doubtful in India. With some improvement *certiorari* and *mandamus* can do all that can be expected of an administrative division of a superior court, for control is necessary over the taxing, rating activities of public authorities, over disputes between such authorities and licensees, when a public authority takes the weaker side in a dispute between different economic interests, as in industrial disputes, and when it decides between private claims as in registration of documents and trade marks.

Despite the wide extension of the scope of the prerogative writs in 1950, the inability of a High Court to issue a writ outside its territorial jurisdiction creates difficulties which the Founding Fathers could not have intended, and one would readily agree that amendment is desirable, if, as the author maintains, the spate of misconceived writ petitions has now abated. Dealing with habeas corpus, he suggests that, as it has been of little value in dealing with preventive detention, the present Preventive Detention Act should be replaced by permanent legislation, advisory boards being abolished, and the power to order detention being concentrated in the Home Minister in each State. This seems curiously at variance with his general attitude: one would have expected him to advocate control of this administrative activity on the lines suggested by Lord Atkin in *Liversidge v. Anderson*.¹ He points out the enormous importance of *certiorari* in the field of administrative law since the Supreme Court adopted the principles laid down in *R. v. Northumberland Appeals Tribunal*²; on the Indian decisions, *certiorari* now lies for any error of law which has caused or is likely to cause substantial injustice, provided it is found on the record, but the bounds of the record may be extended by affidavits from the tribunal or the parties. The author recommends that administrative authorities be compelled to make "speaking orders," and their decisions should be liable to be quashed for error of law not apparent on the record, or for reaching findings of fact not supported by substantial evidence. It is interesting to note that the High Courts have found a way out of some of the difficulties arising from the restrictions on their territorial jurisdiction in the early English practice of issuing prohibition to the opposite party in a proceeding in an ecclesiastical court.

¹ [1942] A.C. 206.

² [1952] 1 All E.R. 122.

Probably the most interesting chapters in this book deal with the declaratory action. As the author points out, on many writ petitions, the final order is, in effect, a declaration of rights; injunctions are not, or should not be, necessary against public authorities. If, as the author suggests, the rules in the code of Civil Procedure and in most statutes dealing with local government authorities, which require notice before suit against governments and public authorities are abolished, and if the provisions of the Specific Relief Act dealing with declaratory actions are replaced by rules suggested by the more modern statutes in the Commonwealth and the United States, this form of action will not only be a valuable protection of individual rights, but also of great assistance to public authorities in a welfare State, in making it possible to determine the legality of proposed activities before heavy expense is incurred on them.

The author is well aware that the excuses for his proof-reading and his index are inadequate. It is a pity that work of this high quality should be marred in this way. It is to be hoped that these defects will be remedied in the second edition.

A. GLEDHILL.

THE BIRTH OF THE BILL OF RIGHTS, 1776-1791. By ROBERT ALLEN RUTLAND. [Published for the Institute of Early American History and Culture by the University of North Carolina Press, Chapel Hill. 1955. \$5.00.]

THIS useful little book could equally well have been called *The Genesis and Fate of the Bill of Rights, c. 600-1955 A.D.* for it has an opening chapter entitled "The English Beginnings," and a concluding one called "Since 1791," which refers to Chief Justice Warren's judgments on segregation in grade and high schools of 1954 and quotes Erwin N. Griswold's *The Fifth Amendment Today*, first published in 1955. These opening and final chapters are unfortunately very brief, but, as the author points out (p. 219) "a summary of the course of American civil liberty since 1791 . . . [he might have well added 'and before 1776'] . . . would call for many volumes." He has compressed his story into 230 readable but scholarly pages and not fallen to the temptation to produce a "summary treatment" running to seven or eight hundred. Because this book is mercifully short it is more likely to be read by students of law and history than a more pretentious tome. It is not a textbook or a case-book; nor is it a monograph presenting a novel thesis or any very fresh points of view. It is rather a brief distillation of the best writings on and interpretations of the United States Bill of Rights, presented within the framework of a helpful yet unobtrusive commentary by the author himself, though mostly he is content to speak through the words of the leading authorities.

The main body of the book, as its title indicates, deals with the period from the signing of the Declaration of Independence to the ratification of the first ten Amendments to the Federal Constitution. A particularly useful chapter is that dealing with "Personal Freedom in the New Republic" (pp. 78-105) which demonstrates the need for a Federal Bill of Rights and the danger of relying on State Bills of Rights alone. It is odd that James Madison (who wrote to Thomas Jefferson on October 17, 1778, "In Virginia I have seen the Bill of Rights violated in every instance where it has been exposed to a popular current.") should nevertheless still at that date have remained unconverted to the need for an explicit protection of these rights in the form of amendments to the as yet unratified Constitution. This chapter also stresses a neglected facet of the Northwestern Land Ordinance

of 1787 wherein "for the first time civil rights became a factor in national legislation" (p. 105).

JOHN A. HAWGOOD.

INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS. By WALTER GELLHORN. [Baton Rouge: Louisiana State University Press. viii and 215 pp. 1956. \$3.75.]

PROFESSOR Gellhorn is well known as one of America's most eminent administrative lawyers and as a penetrating critic of aspects of the post-war loyalty and security programmes. His latest book, which is based on a series of lectures delivered at Louisiana State University, reflects a continuing concern with the condition of civil liberty; but although the theme and the author's basic approach to his theme are serious, the writing is lively, entertaining and sometimes hilarious. It is a book that will be read with pleasure by many who are not lawyers, and a more enticing title might have made it a best seller.

The first chapter, on changing attitudes towards the administrative process, is mainly for lawyers. Before 1945, attacks on the administrative process came from the right, from those who objected to the limitations imposed on freedom of property and contract by the regulatory activities of administrative agencies; now the attacks are directed primarily against the security and loyalty programme and the manner in which discretion is exercised in the admission and deportation of aliens, and the critics are the liberals who had formerly taken up arms in defence of the administrative agencies. "The chorus of concern about the administrative process peals forth today with no abatement of yesteryear's volume; but the choristers are different, and those who formerly joined most lustily in the singing now seek to still it." Professor Gellhorn rightly observes that judicial review of orders impairing the liberty of the person is more important (though less comprehensive) than judicial review of orders affecting proprietary and contractual rights, and that it is more important because the practical effect of orders of the former class is generally far more calamitous to those prejudicially affected than is the effect of orders of the latter class. In this country the problem is less serious, but it is unsatisfactory that the regulation of aliens should be almost entirely excluded from the field of judicial review.

Turning to his second topic, restraints on book reading, Professor Gellhorn comes down unequivocally in favour of the widest measure of freedom of individual choice. Public exhibitions of indecent or offensive behaviour which are thrust upon members of the community can appropriately be dealt with by the machinery of the criminal law; but everyone has the option not to read an erotic book, a horror comic or a Communist diatribe, and it is better that selection of reading-matter should be regulated by individual judgment than by the discretion of public officials or even of judges and juries. In the United States administrative censorship of reading-matter exists at federal, State and local levels, and it is perhaps most insidious when it is conditioned by the activities of local pressure-groups in communities where the urge towards conformity is strongest.

The last chapter, on the right to make a living, is concerned mainly with the problem created by the success of occupational groups in persuading State legislatures to invest them with statutory licensing and regulatory powers—powers which are too often exercised for the benefit of the group but to the detriment of the public interest. In some States well-diggers and scrap tobacco dealers, embalmers and removers of superfluous hair, have been accorded quasi-professional status. Professor Gellhorn was able to supply his audience with a case study in the history of the State Board of Control

of Cosmetic Therapy, a body in which the licensed cosmeticians had contrived to establish a decisive ascendancy.

The right to make a living may be threatened not only by restrictive group practices but also by the application of irrelevant loyalty tests by licensing authorities. Pharmacists in Texas, veterinary surgeons in Washington and professional boxers and wrestlers in Indiana must swear oaths denying any Communist affiliations. The question whether political views are to be regarded as a material factor in determining fitness to follow an occupation has given rise to acute controversy in still more learned professions, and the debate is not yet ended. It is a debate now set in an American context, but its implications have no geographical frontier. Among the contributions to that debate, few can have rivalled Professor Gellhorn's in forthrightness or distinction.

S. A. DE SMITH.

VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION. By THOMAS REED POWELL. [New York: Columbia University Press. London: Geoffrey Cumberlege. 1956. xv and 229 pp. 28s. net.]

IN 1955 Professor Powell delivered the fourteenth series of the James S. Carpentier lectures at Columbia University. He died soon afterwards, and his lectures were edited for publication by Professors Freund and Brown of Harvard. Powell was one of America's most distinguished constitutional lawyers. Because he wrote articles rather than books his work was not well known in this country. Of his standing in the United States, it is enough to say that the roll of Carpentier lecturers includes the names of Bryce, Gray, Pollock, Ilbert, Vinogradoff, Holdsworth, Cardozo and Carr. He reveals himself as a forceful controversialist, with a keen analytical insight and an astringent wit. He was frankly contemptuous of what he called "judicial professions of automatism": he summed up his series of lectures as a "study of vagaries, variations, and irregularities in the constitutional law manufactured by the judges." The lectures cover the origins of judicial review of legislation, the role of judicial discretion in constitutional interpretation, the growth of the federal commerce power, and federal-State economic relations, with special reference to taxation of governmental instrumentalities, the State police power and the State taxing power. In these matters he is generally in strong sympathy with the school of judicial thought represented by Holmes, Cardozo, Brandeis and Stone. He does not touch on the law relating to civil liberties.

The lectures are tough in intellectual content, and they will not be easily digestible by those of us who have not been nurtured on a diet of American constitutional law; but when the dish is so attractively served, the prospect of a mild attack of indigestion may be faced with equanimity.

S. A. DE SMITH.

GOVERNMENT UNDER LAW. A conference held at Harvard Law School on the occasion of the bicentennial of John Marshall. Edited by PROFESSOR ARTHUR E. SUTHERLAND. [Harvard University Press. Distributed in Great Britain by Oxford University Press. 1956. xi and 587 pp. £3.]

IN 1955 the Harvard Law School held a conference to celebrate the two-hundredth anniversary of John Marshall's birth. This is the kind of project

which the Americans do often and superlatively well and which we English attempt rarely¹ and with somewhat embarrassing results. Neither time, money (ex-Rockefeller Foundation) nor talent was spared to make the occasion the success that it undoubtedly was, and for three days a most distinguished gathering of legal luminaries—practising and academic—discussed, with learning, wit and good humour, various aspects of the Rule of Law in today's troubled world. Among those who actively participated were the Chief Justice and two Associate Justices of the U.S. Supreme Court, the Chief Justices of Australia, Canada and South Africa, the Master of the Rolls, two Federal Court judges, the Chief Justice of Massachusetts, representatives of the Civil Law countries (including Professor André Tunc of Grenoble), Father Joseph M. Snee S.J., and many other prominent lawyers and teachers. The formal set pieces—eight weighty essays—were printed and circulated in advance of the conference and may already be known to some in this country. Now, thanks to the meticulous and imaginative editing of Professor Sutherland, we have a full transcript of the essays, the discussions thereon, and of the speeches and additional papers delivered at the working sessions and social gatherings by Chief Justice Earl Warren, the Dominion Chief Justices, Mr. Justice Felix Frankfurter, Lord Evershed, Professor Tunc, President Pusey and Dean Griswold. The volume is produced in a manner fully worthy both of the occasion and of its contents and is enlivened by excellent photographs enabling us and posterity to visualise exactly what the participants looked like while at the giving or receiving end of the spate of oratory and while enjoying the (obviously rare) moments of relaxation.

Though the contents of the resulting volume vary both in scope and permanent value the uniformly high quality is all that could have been expected from the distinguished participants on an inspiring occasion. After a felicitous opening oration by Justice Frankfurter, the conference addressed itself to four principal themes—Government as Protector of the People against the Government (essays by Professor Tunc and Father Snee), Government under Law in Time of Crisis (Professor Charles Fairman and Mr. Francis Shackelford), the Meaning of Due Process (Judge Hastie and Dean Bundy) and the Value of Constitutionalism Today (Judge Wyzanski and Mr. John Lord O'Brien). Since the essays had been circulated in advance, the discussion of them was well-considered and weighty. It was also lively; do not miss, for example, the characteristically incisive comments on Father Snee's paper by Professor Henry M. Hart (at pp. 139-145) which caused the Chairman to remark that, "It seems to me that he has taken on the whole Conference rather than just Father Snee," and echoes of which reverberated round the Conference Hall throughout the three days. Lacking Professor Hart's gifts I will not attempt to comment on these contributions in the space here available. It must suffice to say that the speakers were at the top of their form and provided food for thought which should sustain Constitutional lawyers and legal philosophers until Marshall's tercentenary.

Of equal merit, but on a rather different level of abstraction, are the contributions from the judicial visitors from abroad. Here, as it seemed to me, the papers of Lord Evershed and Sir Owen Dixon are of especial interest, not only because of what they say but because of their approach to what they have to say. Anyone interested in national characteristics should compare their papers with those of any of the American contributors. Lord Evershed and Sir Owen are, perhaps, as philosophically minded as any members of the British Bench, and they are not unwilling to make sweeping generalisations and to draw bold conclusions, but, unlike the Americans, they seem happier when they revert from abstractions to practical details. Not that the Americans are averse to discussing practical problems, but when they do so it is "in the grand manner." *They* discuss how the American governmental machinery should be reformed in the event of an atomic war (pp. 232 *et seq.*):

¹ Did we celebrate Mansfield's bicentennial? If so how, and who organised it?

Lord Evershed discusses the Rent Acts (pp. 155 *et seq.*). This, I suspect, epitomises one of the significant differences between the American and the British lawyer.

This volume also affords an opportunity of contrasting the Anglo-American approach with that of the civilian. The two papers by Professor Tunc (one of the very few French lawyers who speaks perfect English and knows American law almost as well as the French) are models of compression and illumination. They suggest (not for the first time) that we tend to exaggerate the differences between the two methods. They also make me wonder whether the civilian (as illustrated by Professor Tunc) is not closer to the British approach than to the American. But if I draw any more sweeping conclusions I shall refute my own thesis.

I will therefore conclude with but one more: This is a grand book.

L. C. B. G.

ADMINISTRATIVE ORGANISATION. By P. MEYER. [London: Stevens & Sons, Ltd. 1957. 317 pp. £2 5s. net.]

THIS is not a law book, but an attempt to lay down general principles of public administration. The academic study of public administration has made much progress in the last decade; especially important in its theoretical aspects are the writings of Americans such as Simon and Waldo. The author has not written an original work; he has read extensively both works on the theory of public administration and accounts of public administration in Britain, France, Germany, U.S.A. and his native Scandinavia, and has attempted to systematise this material. The result is a clearly written comparative study which will be very useful to anyone concerned to get a bird's-eye view of recent academic developments in public administration.

H. STREET

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS. HERAUSGEGEBEN VON DEN MITGLIEDERN DES BUNDESVERFASSUNGSGERICHTS.
Volume 5. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1956. viii and 408 pp. DM. 26.]

THIS volume of decisions of the German Supreme Constitutional Court contains what is undoubtedly one of the longest judgments ever enunciated by a German court. The issue was whether the Communist Party was an unconstitutional party within the meaning of article 21 (2) of the Basic Law of 1949. This article provides that a party is unconstitutional if it intends—either by its official aims or by the activities of its adherents—to impede or remove the free and democratic order in the Federal Republic of Germany. The Supreme Constitutional Court has spent no less than 300 pages on proving that the Communist Party is unconstitutional within the meaning of this article. The judgment exposes a great deal of characteristic Communist double-talk and contains an interesting brief exposé of the history of Communism in Germany. It also defends convincingly the right of a democratic State to protect its existence against the sworn enemies of its basic order. The Constitutional Court in interpreting article 21 (2) could refer to the views which it had adopted in its earlier decision (published in the second volume of the series of reports) by which it had declared the Socialist Reichspartei, a neo-nazi movement of some importance at the time, to be unconstitutional. Having regard to this earlier decision many readers will perhaps feel that by filling 300 pages with refuting the exceedingly

specious arguments advanced by counsel for the Communist Party the court has done rather more than justice to the position of the losing side.

The rest of the volume contains several interesting decisions. One of them deals with the position of Herr Schmidt-Wittmack, a Western German deputy who changed sides and is now residing in Eastern Berlin where he holds some office under the Eastern German Government. This gentleman had the courage to complain to the court against a resolution of the Federal Parliament declaring his mandate as a member of the Bonn Parliament to have been terminated. The court rightly held that he was now a permanent resident outside the Federal territory and thereby precluded from being a deputy in the Bonn Parliament. Herr Schmidt-Wittmack's attempt at drawing Western German deputy's pay while actively supporting the Eastern German Government consequently failed.

Another judgment sheds a significant light on the queer relationship between East and West in Germany. The petitioner had been habitually resident in Eastern Germany on his eighteenth birthday, but fled to Western Germany shortly afterwards. In Eastern Germany minority ends at the termination of the seventeenth year of life, in Western Germany on the twenty-first birthday. It is a rule of the German law of conflict of laws that majority once attained in a foreign country is not lost by the acquisition of German nationality. Several lower courts had held—not very convincingly, it would seem—that this rule was applicable to the present case and that the petitioner remained of full age in the Federal Republic on the ground that he had attained majority in the so-called German Democratic Republic. The Constitutional Court—without expressing any opinion on the correctness of this view—held that he could not complain against these decisions on the ground that they constituted a “discrimination on the ground of home or origin” against him, within the meaning of article 3 (3) of the Basic Law.

This volume—like its predecessors—is of considerable interest not only to lawyers or specialists in German affairs, but in general as a mirror of human, social and political conditions in these times.

E. J. COHN.

THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS. By CHARMIAN EDWARDS TOUSSAINT. [London: Stevens & Sons, Ltd. (for the London Institute of World Affairs). 1956. ix + 288 pp. 37s. 6d. net.]

THIS study of the legal and institutional aspects of the Trusteeship System by Dr. Toussaint is a very welcome addition to the Library of World Affairs series. It is divided into six parts. The first traces the origins of the trusteeship system from Burke's speech in the Commons on the India Bill in 1783 and his impeachment of Warren Hastings to the proceedings of the San Francisco Conference in 1945. The second part is an examination of the scope and aims of the system, and this includes a full discussion of the compatibility of administrative unions with the aims of the system. The third part is a detailed analysis of the actual Trust Agreements and Dr. Toussaint brings out the differences between various agreements and discrepancies between these agreements and the Charter provisions; here her examination of the meaning attributed to that controversial phrase in Article 79, the “states directly concerned,” is most useful. The argument that the International Court is the proper body to interpret the meaning of this phrase is persuasive but fraught with difficulties in practice, for the “concern” of the States may be economic, political, racial or strategic in origin. The fourth part covers the actual machinery of supervision and here Dr. Toussaint attempts to describe and delimit the competence of the various U.N. organs connected

with the supervision of the trusteeship system. The fifth deals with the administration of the territories, the types of administration permissible, and the obligations of the administering authority. The sixth, and last, part is concerned with the relation between Chapter XI of the Charter, the Declaration Regarding Non-Self-Governing Territories, and Chapters XII and XIII on the actual trusteeship system; here can be found a full discussion of the attempts by the non-colonial powers to assimilate the U.N. "supervision" under Chapter XI with the supervision under the trusteeship system.

The whole work is completed by an excellent bibliography and there is also an addendum covering the Advisory Opinion of the I.C.J. of June 1, 1956, on the grant of oral hearings to petitioners on matters relating to the territory of S.W. Africa. This addendum is, necessarily, brief; it is a little disappointing that Dr. Toussaint is also rather brief on the Advisory Opinions of 1950 and 1955.

Dr. Toussaint raises a number of interesting points which arise out of *lacunae* in the Charter. For example, what happens when only part of a trust territory is designated as a strategic area; do both the General Assembly and the Security Council have to approve the trust agreement? What happens when the number of trust territories diminishes (as it may well do when independence or self-government is attained) to the composition of the Trusteeship Council as specified in Article 86 (i) (c)? What becomes of the machinery for supervision when the U.N. itself takes over the administration of trust territory, and who are the "states directly concerned" in such a case? Another problem, raised by the administration of trust territory by a non-member State, has in part been solved; Italy, deprived of membership of the Trusteeship Council by Article 86 of the Charter so long as she remained unadmitted to the U.N., was given representation without vote in the Council under the Rules of Procedure. These are all examples, well taken by Dr. Toussaint, to show the lack of foresight in drafting the Charter provisions on trusteeship.

The one point at which this reviewer finds some difficulty in reaching accord with Dr. Toussaint is in her analysis of the process whereby territory is brought under trusteeship. She says (p. 253 in Conclusion and also p. 209):

"From the provisions of the Charter, it emerges that there are two agreements involved in the bringing of a territory under trusteeship: an agreement between the 'states directly concerned' on the terms of trusteeship; and the actual trust agreement between the United Nations and the Administering Authority by which they approve these terms and agree to play the roles assigned to them therein."

This reviewer would prefer to regard it as one agreement, admittedly needing two stages for completion, but nevertheless one agreement; for if by agreement one means a binding expression of wills the first "agreement" is no agreement at all, but simply an agreed draft which may, or may not, be accepted by either the General Assembly or the Security Council, and which becomes binding only upon the approval of the appropriate organ.

This is essentially a lawyer's work, with something of the Kelsen approach to problems of interpretation, and its value lies in its thorough and impartial analysis of the trusteeship system from the legal standpoint. The author's use of the term "non-colonial power" rather than "anti-colonial power" is symptomatic of a consistent attempt by the author to avoid any form of bias or subjective judgment on the political premisses upon which the trusteeship system is founded or the political motives behind individual State policies on trusteeship matters. There is no discussion here of the fundamental question of whether independence or self-government are really desirable objectives for these many non-self-governing territories; the current history of Indonesia must give cause for debate on that, as must also the trend towards integration and federation in other parts of the world. The purely legal approach also has the disadvantage of concealing something of the acute political antagonism

for which the Trusteeship Council has become an arena, and much of the quibbling by States on questions of interpretation becomes explicable once the political aims behind these quibbles are laid bare. On balance, however, Dr. Toussaint's policy of confining herself to strictly legal issues is the right one. The result is a happy testimony to her own attainment of independence under the careful tutelage of Dr. Schwarzenberger.

D. W. BOWETT.

THE COUNCIL OF EUROPE. By A. H. ROBERTSON. The Library of World Affairs, No. 32. [London: Stevens & Sons, Ltd. 1956. xiii and 252 pp. £2 2s. net.]

SINCE the Second World War international society has been faced with a plethora of international institutions, some of which have been or aimed to be universal, others regional, some political in character and others functional. Recent events have shown that there is likely to be more success on the regional scale than on the universal, and that functional organisations are likely to achieve more of their objects than are the political ones.

Occasionally an institution is established that is both regional and, at least from the point of view of practical achievement, functional as well. Such an organisation is the European Coal and Steel Community. A somewhat larger organisation which associates political aims with its functional activities is the Council of Europe. The Statute of the Council was signed in 1949 and by the end of 1955 the Council had been responsible for the drawing up of ten conventions. These deal with human rights—and, unlike the Universal Declaration of Human Rights promulgated by the General Assembly of the United Nations, this is a binding document and seeks to set up an international court—social security, medical services, the exchange of war cripples for medical treatment, patents, establishment, culture, and the recognition of diplomas for university admission.

Dr. Robertson is an official of the Council's Secretariat and Joint Editor of its *European Yearbook*. In his *Council of Europe* he seeks to present the Council as it is and as it works, indicating what it is trying to do, even though it does not always succeed, for reasons that are partly constitutional and partly political. It has not been the author's task to criticise the Council's achievements, for "the Council is still in its infancy [and] . . . it is still too early to draw conclusions about [its] success or failure" (p. 210). His aim has been to describe "an international parliamentary assembly, independent of governments, whose members have a mandate that is not national but European," and the substance of his book is "the way in which this Assembly works and the interaction between it and the traditional organ of inter-governmental co-operation which is the Committee of Foreign Ministers" (p. xi). In assessing the achievements of the Council Dr. Robertson reminds us of something which is too often ignored by critics of all international institutions, including the United Nations, namely, that the organisation is only as successful as the member States let it be, and that criticism should be directed at the States concerned rather than at the organisation.

As an example for future institutions the Council of Europe shows that an international "House of Commons" is not an impossibility; that conventions of a binding character falling within the sphere of domestic jurisdiction can be worked out on a multilateral basis, provided there is a common understanding of and a common approach to the basic fundamentals of the way of life of the States concerned; and that a co-ordinating body for existing functional institutions can work, can reduce effort and prevent duplication. How this has been effected is fully demonstrated by Dr. Robertson in his *Council of Europe*, and no student of international institutions, whether his

approach be that of the lawyer or of the international relations specialist, can afford to overlook it.

L. C. GREEN.

GERMANY AND THE NORTH ATLANTIC COMMUNITY. By M. E. BATHURST and J. L. SIMPSON. [London: Stevens & Sons, Ltd. 1956. xi and 216 pp. 35s. net.]

THIS valuable book owes its existence to the practical experience which its authors have gained in the course of their work for the Foreign Office and its agencies and which has provided them with an almost unique qualification for discussing authoritatively the subject of Germany's legal status.

It is a subject of unprecedented character and complication and the authors have done well in describing in some detail the development which has taken place in the short space of ten years or so and which comprised a few months of "conventional belligerent occupation," four years of Military Government and six years of Federal Republic rule supplemented by the authority of the Allied High Commission. During this period something like eighty treaties relating to Germany were concluded and their effect is lucidly described by the authors. There is at least one point on which they provide information that will be new to most readers. In September, 1950, the Western Powers declared that pending the unification of Germany they considered the Government of the Federal Republic as the only Government legitimately constituted and entitled to represent the German people and to assume the rights and obligations of the former German Reich. At the same time an Interpretative Minute was signed which was apparently published only by the French Prime Minister in the French National Assembly and according to which the formula used in the Declaration did not involve the recognition of the Federal Republic as the *de jure* Government of all Germany (p. 188).

In view of the complex legal situation which prevailed throughout the period covered by this book there was at one time every reason to think that the courts would be called upon to pronounce upon some of the numerous problems which arose. Not unnaturally this in fact occurred in Germany, where an immense number of decisions dealt with Germany's legal status and its manifold implications; all except one seem to have been ignored by the authors. But apart from German decisions the available judicial material is not very extensive. On the whole it has been duly noted by Messrs. Bathurst and Simpson, though they might have considered the decision of the U.S. Military Tribunal in Nuremberg in the *Case of Josef Altstotter and Others* (*Law Reports of Trials of War Criminals*, U.N. War Commission Series, Vol. VI (1948), pp. 29 *et seq.*) and closer attention might usefully have been devoted to the full report of Lord Merriman's decision in *The Hermes*, which appeared in 1 Ll.P.C. (2nd) 289 and which contains important matter not included in the report ([1951] 2 T.L.R. 60) referred to by the authors (p. 23) and not mentioned in the opinion of the Privy Council. Although since March, 1947, it had been urged academically that, for instance, for purposes of jurisdiction in prize, the war had ended on June 5, 1945, it was only in the litigation relating to *The Hermes* that "it was conceded by the Crown that the rights which [the United Kingdom] have *jure belli*, including rights of prize, were 'abrogated' by the Declaration" of that date. "This curious story," as Lord Merriman called it at p. 293, should not be left unnoticed. The authors' treatment of the large literature on their subject is also a little eclectic and occasionally almost perfunctory, and there is room for doubt whether they throw much fresh light on the problems of general international law with which they are concerned. They join those who held that after June, 1945, Germany continued to be a State, though "an abnormal one" (p. 41)—a classification which might have been capable of further elaboration. They

agree that for purposes of international law the state of war ended on June 5, 1945 (pp. 46, 47), and that the reason was that "the four Powers could not continue to be at war with a State the Government of which they had assumed"; whether it was a legal necessity that after that date the Hague Regulations "could" no longer apply (p. 47) is perhaps not absolutely certain. However, the authors agree that in fact the Hague Regulations ceased to be applicable, the main reason lying in the absence of a legitimate German Government (p. 48). The authors submit that even in his own zone the Military Governor was the agent of the four Powers jointly (p. 43); this, it is believed, is a correct interpretation which, indeed, involved "certain consequences . . . in the municipal law of the United Kingdom" (p. 42).

The reader will find many other points of interest in this work which is based upon a thesis accepted by the University of Edinburgh for Mr. Simpson's degree of D.LITT. and which, as Messrs. Bathurst and Simpson explain in their Preface, "is intended to be a broad survey of the main legal issues." They also indicate the necessity for further detailed studies on special subjects. It is to be hoped that they will themselves find the opportunity of adding to the substantial contribution they have already made.

F. A. MANN.

INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT. By MANUEL R. GARCÍA-MORA. [Washington, D.C.: Public Affairs Press. 1956. vii and 171 pp. \$4.50.]

It is indeed a change in international law to find a book in which the author states quite specifically that he is writing *de lege ferenda* (p. v). It is Dr. García-Mora's purpose in his *International Law and Asylum as a Human Right* to prove that the "asylum accorded to those suffering from persecution and oppression has developed from a practice into a right of the individual—a right which is respected as an act of humanity. Thus, in granting asylum a State is merely enforcing an already existing human right" (p. 2). "In recognition of the foregoing considerations, this book is dedicated to the idea that the protection of human rights engages vital interests of the world community and that, consequently, States should be under the legal obligation to grant asylum to those fleeing from persecution and oppression" (pp. 2-3). Dr. García-Mora therefore goes beyond the Universal Declaration of Human Rights, for while this recognises the right of the individual to seek asylum, it imposes no obligation upon any State to grant such asylum.

In this connection, it must be pointed out that the learned author uses the term "asylum" in what is both a wider and at the same time narrower sense than the term often carries. In international law, as was pointed out by the World Court in the *Asylum Case*, asylum is of two kinds: territorial, that is to say, sanctuary accorded to an individual who has fled from his own State; and political, sanctuary granted in diplomatic premises to an individual who is the national of the State in which the premises are situated. To a great extent, the term has tended to be confined to the latter type. Dr. García-Mora, however, excludes any consideration of this type of asylum from his book on the ground that it "is at best a local usage not yet part of universal international law" (p. 1).

At present international law recognises that in the absence of an extradition treaty, a State is fully at liberty to afford territorial asylum to whomsoever it pleases. The learned author maintains that this recognition of sovereignty places the emphasis in the wrong place. He would like to change this emphasis and alter the entire basis of the institution. He believes "that to resort to the strict application and interpretation of traditional rules of international law, which have proved to lag behind the requirements of

the time, would amount . . . to a clear denial of the legitimate hopes and aspirations of the peoples of the globe with respect to the enjoyment of civil liberties and the respect for human dignity in the face of turbulent political conditions" (p. 162). For this reason he believes that asylum should no longer depend upon the good will of a State, but should belong as of right to every individual seeking it.

In order to ensure respect for the right of asylum, Dr. García-Mora recognises the need for an "international judicial organ of sufficient authority and impartiality" to which individuals will be able to summon their own States, together with an "international organisation of a political character [which] might objectively decide questions of asylum [and] enforce the right of asylum" (pp. 165-166). The learned author recognises that "before the State can be regarded as the agency which under all conditions will protect individual rights, there is a need to develop a high degree of political integration of the international community and of solidarity among its members. Nations will then discharge their responsibilities in the protection of human rights regardless of the repercussions which such a policy may have in their relations with one another" (p. 164). If such an idealistic situation were in fact created, is it not possible that there would no longer be any need for individuals to seek asylum?

L. C. GREEN.

HISTORICAL CONSPECTUS OF ROMAN LAW. By R. W. LEE, Reader in Roman Law and Roman-Dutch Law of the Inns of Court. [London: Sweet & Maxwell, Ltd. Second impression, revised. 1956. vii and 48 pp. 5s. net.]

ELEMENTS OF ROMAN LAW. By R. W. LEE, D.C.L., F.B.A. Fourth edition. [London: Sweet & Maxwell, Ltd. 1956. xxviii and 499 pp. 30s. net.]

EVERY teacher of Roman law is faced with an increasing number of students who know no Latin and whose hazy notions of Roman history are derived as much from the cinema as the classroom. The lack of Latin is a deficiency which the teacher reluctantly accepts, but he usually seeks to repair the ignorance of history by prefacing any lectures on Roman law with some sort of historical introduction, however slight. This task is now done for him by the *Conspectus*, between whose paper covers the author distils a lifetime's experience of Roman law teaching by telling with an economy of words and a sure instinct for the gnomic phrase the tale of Rome's rise, decline and fall. This he does in Part I (pp. 1-21), which ends with the death of Justinian.

It is Part II, however, which is the more valuable half of this little book and justifies its title of *Conspectus*. For in this part the story of Rome's wondrous offspring, the *corpus juris civilis*, is carried down through the Middle Ages to the present day. Although only containing the barest outline these pages should give the student that sense of the vitality and continuity of Roman law which the author pronounces in his preface to be his chief aim; they provide in short compass and at a beginner's level what is not to be found elsewhere, for Koschaker's *Europa und das römische Recht*, to which the author pays handsome tribute, is a long work and, in any case, only available in German.

It is unfortunate that the balance of Part II is disturbed by the last nine of its twenty-three pages being devoted exclusively to the pioneers of the Roman-Dutch system. This over-emphasis arises (as the preface explains) from the *Conspectus* being written for Bar students beginning either Roman law or Roman-Dutch law. But as most Bar students use as their standard textbooks in these subjects the author's own *Elements of Roman Law* or his

Introduction to Roman-Dutch Law might it not be preferable to expand the introductions of both these textbooks so as to incorporate the additional matter to be found in the *Conspectus*? In his *Elements of Roman Law* this would only amount to the addition of some dozen or so pages taken chiefly from Part II of the *Conspectus*; in the *Introduction to Roman-Dutch Law* space might be found to embody *in toto* the history of Roman law contained in Part I. This suggestion, if adopted, would make students of Roman-Dutch law more conscious of its ancient roots, while students of Roman law would be encouraged to look forward beyond Justinian to the modern civil law.

The author's *Elements of Roman Law* is now a well-established favourite with both students and teachers. If a knowledge of Latin is no longer required in many Faculties of Law, then this textbook does at least have the merit of forcing the attention of the student to Justinian's *ipsissima verba* in translation. As might be expected, the new edition makes little change in the content of the third edition. The change is rather one of presentation. Passages which the author considers of less importance are printed in a more densely set type. On perusal of the book very little of the text will be found to have suffered this *capitis deminutio*. Yet in a book which is already stripped of trimmings this encouragement to the student to skip is surely to be deprecated: he will hardly be encouraged to read between the lines when he sees the intervals between them diminished to vanishing point. Subject to this criticism and to the suggestion made above for embodying matter from the *Conspectus*, the new edition is to be welcomed on several counts: it is well produced and reasonably priced; the type-face is smaller and more attractive than in the third edition and the general lay-out much improved; finally, it is heartening to see a book on Roman law reach a fourth edition.

L. NEVILLE BROWN.

Books and Publications Received

GRUNDSÄTZE DES ENGLISCHEN ZIVILRECHTS. By DR. RAINER JAECKLE. [Verlag Franz Müller-Rodenberger. Frankfurt a. M. 1957. 39 pp.]

THE CONTINUING CHALLENGE OF THE HUNGARIAN SITUATION TO THE RULE OF LAW. Supplement to the Report of the International Commission of Jurists published in April, 1957. [47 Buitenhof, The Hague, Netherlands. June, 1957. 33 pp.]

CIVIL LIBERTIES DOCKET. Vol. II, Nos. 3 and 4. [National Lawyers Guild, 40 Exchange Place, New York 5, N.Y. 1957.]

COMPILATION OF THE LEGAL PROVISIONS, REGULATIONS, CIRCULARS AND FORMS RELATING TO DOUBLE TAXATION RELIEF IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND. Edited and introduced with Illustrations by F. E. KOCH and RICHARD MOSS. [Amsterdam: Publications of the International Bureau of Fiscal Documentation, No. 10, Herengracht 196. February, 1957. 164 pp. 17s.]

ENCYCLOPAEDIA OF PLANNING, COMPULSORY PURCHASE AND COMPENSATION. Vol. I, Revisions 28 and 29; Vol. II, Revisions 27 and 28. [London: Sweet & Maxwell, Ltd.]

WHERE TO LOOK FOR YOUR LAW. Twelfth Edition. [London: Sweet & Maxwell, Ltd. 1957. 190 pp. Ordinary Copy 7s. 6d., Interleaved Copy 15s. net.]

THE LAW QUARTERLY REVIEW. Index to Volumes 1-72. By PETER ALLSOP, M.A. [London: Stevens & Sons, Ltd. 1957. xii and 326 pp.]

INTRODUCTION TO INCOME TAX LAW. Canada. By FRANCIS EUGENE LA BRIE, B.A., LL.B., LL.M., D.JUR., with the assistance of MARCEL BILANGER, M.A., C.A. [Toronto: C. C. H. Canadian, Ltd., 1200 Lawrence Ave., W. Toronto 10, Ont. x and 388 pp. \$7.50.]

THE LABOUR INJUNCTION IN BRITISH COLUMBIA. A Study of the operation of the injunction in Labour-Management Disputes in British Columbia, 1946-1955. With particular reference to the law of picketing. By A. W. R. CARRUTHERS, B.A., LL.B., LL.M. [Toronto: C. C. H. Canadian, Ltd., 1200 Lawrence Ave., W. Toronto 10, Ont. xxi and 276 pp.]

THE MUSLIM MARRIAGE, DOWER AND DIVORCE. By C. M. SHAFQAT. Foreword by HON. MR. JUSTICE S. A. RAHMAN, Chief Justice, West Pakistan High Court. [Lahore. 1955. xi and 204 pp. Rs. 7/8/-.]